

A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons

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As state and local budgets tighten, municipalities have turned to civil fines and penalties to fill empty coffers. These fines and fees, often termed legal financial obligations or economic sanctions, arose as a way to shift the costs of criminal adjudication to those charged with criminal activity. But many jurisdictions are now using jail time to coerce poor, mostly minority violators of minor infractions, such as truancy, driving offenses, littering, and jaywalking, into paying fees they cannot afford. These fines are only the beginning, as municipalities tack on court fees, payment plan charges, other costs, and interest. Small debts spiral into enormous ones, and nonpayment can result in incarceration. Collection of these debts is often outsourced to private debt collectors, who use aggressive tactics and charge collection fees, creating a never-ending cycle of debt and incarceration. This cycle is not only devastating to the poor and poor communities, but it makes no sense, because people wind up jailed at costs far exceeding their original fines. The result is that the rich may walk away, while the poor must pay or stay.

This Note explores the origins of and shift to this system of municipal fines; how the current scheme operates outside the bounds of the Constitution; its disastrous effects on poor communities, particularly communities of color; and several alternatives and avenues for legal reform.

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* J.D., Harvard Law School, 2015. The initial inspiration for this topic came from researching truancy fees during my summer at the NAACP Legal Defense Fund. I am deeply indebted to professors Jeanne Charn, Adriaan Lanni, and Lani Guinier for their guidance, feedback, and support throughout this process. Special thanks go to practitioners Sara Zampierin of the Southern Poverty Law Center for setting me straight on some issues, and Lauren-Brooke Eisen at the Brennan Center for Justice for pointing me in the right direction on others. Finally, thanks to Jeff Soules, Deena Greenberg, and the editors of the *Harvard Civil Rights-Civil Liberties Law Review* for reading untold iterations of this Note without complaint. All errors are my own.

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INTRODUCTION

On Friday, June 6, 2014, after fifteen years of evading the system, a Pennsylvania mother of seven turned herself in.¹ She put on a pair of clean sweatpants, combed her hair, and taped her broken glasses together as neatly as possible. At the Berks County Courthouse, the judge accepted her surrender, and guards led her to the county jail to serve out her 48-hour-sentence. She made it barely halfway. By the next afternoon, Eileen Dinino, 55, was dead in her cell.

Her crime? Unpaid truancy fines.

How did Ms. Dinino get there? As state and local budgets tighten, municipalities have turned to civil fines and penalties to fill empty coffers.² Beginning in the 1960s but taking off strongly in the 1980s, these fines and fees, often termed legal financial obligations (“LFOs”) or economic sanctions,³ arose as a way to shift the costs of criminal adjudication to those “using” the system: those charged with criminal activity. Defendants in criminal cases began having to pay restitution,⁴ court costs,⁵ room and

¹ Facts here are drawn from the circumstances surrounding the death of Eileen Dinino. Maryclare Dale, *Mother Of 7 Jailed For Kids’ Truancy Fines Found Dead In Cell*, HUFFINGTON POST (June 13, 2014), http://www.huffingtonpost.com/2014/06/11/eileen-dinino-dead-pennsylvania-jail_n_5486353.html, archived at <http://perma.cc/SQ7D-L3LH>.

² See Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 68 (2013) (citing budget constraints as a factor in pay-to-stay schemes that charge inmates for room, board, and other costs of their own incarceration).

³ I use the terms “legal financial obligations,” “economic sanctions,” and “carceral debt” interchangeably.

⁴ Restitution is payment from an offender to a victim for losses suffered as a result of the crime. It is authorized in every state. R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 756 (2011).

⁵ AM. CIVIL LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS* 8–9 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf, archived at <http://perma.cc/SA2A-QXLE>.

board,⁶ and even public defender fees.⁷ As time went on, fees spiraled into new areas: DNA testing, medical examinations, even jury selection.⁸ Today, a weak economy, misplaced faith in the “broken windows” theory of criminology, and lack of regulatory oversight have allowed municipalities to extend this practice to petty criminal violations. Many cities, towns, and villages routinely charge fines for petty misdemeanors or violations, such as truancy, driving infractions, public drunkenness or urination, jaywalking, or even bounced checks for government services such as school lunches. While these violations are theoretically too minor to carry a prison term, nonpayment of fines can result in imprisonment for “contempt of court.” The threat of jail time coerces poor, mostly minority violators of low-level offenses into paying up or getting put away.⁹

These initial tickets and citations are only the beginning, as municipalities tack on additional court fees, payment plan charges, costs, surcharges, and interest. To make matters worse, collection of these debts is often outsourced to private debt collectors, who not only use aggressive tactics but also charge additional collection fees, creating a never-ending cycle of debt and incarceration. A simple \$30 bounced check suddenly transforms into a \$700 debt.¹⁰ This cycle not only devastates poor communities, but also makes no sense, as people wind up jailed at costs far exceeding the harm of their minor conduct, such as stealing a \$2 can of beer.¹¹ The result is that the rich may walk away, while the poor must pay or stay.

Existing literature has focused on those who struggle to re-enter society while saddled with enormous debts accrued from their time in prison.¹² However, most poor people encounter legal debt having faced neither prison nor parole,¹³ but rather a routine municipal fine or fee for local ordinance

⁶ Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 320 (2014).

⁷ Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 323 (2009).

⁸ *Id.*; Wendy Heller, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL’Y 219, 226–29 (2006); Joshua Michtom, *Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 187 (2004); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 966–67 (2013).

⁹ This Note examines fines, court fees, surcharges, and collection costs that apply to low-level offenses and does not discuss the effects of restitution or pay-to-stay fees.

¹⁰ Alan Pyke, *Mother Forced To Pay \$700 Over Bounced \$30 Check For School Lunches*, THINKPROGRESS (Oct. 8, 2014), <http://thinkprogress.org/economy/2014/10/08/3577468/debt-collectors-school-lunch-mom/>, archived at <http://perma.cc/399W-TUU6>.

¹¹ Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

¹² See *supra* note 8 and accompanying text.

¹³ Over ten million misdemeanors are charged each year, compared to one million felony cases, which typically result in a year of jail time or more. An exact count is difficult, as many states do not track misdemeanors at all. Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, SLATE (Apr. 27, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/

violations, such as driving offenses.¹⁴ Part I of this Note explores the origins of LFOs and the shift to this system as a revenue stream and a “broken windows” tool for social reform. Part II illustrates how the current scheme imposes extraordinary fines and fees for petty offenses, jails indigent defendants for nonpayment, and turns them over to private collection companies who concern themselves only with the bottom line. Part III examines the due process and equal protection limitations on economic sanctions—protections ignored by municipalities all across the country. These practices have disastrous effects on poor communities, particularly communities of color, as discussed in Part IV. Finally, I address several alternatives to this system and avenues for legal reform in Part V.

PART I: HOW DID WE GET HERE?

The use of fines as criminal punishment dates back to ancient times and is recorded by the Greeks,¹⁵ Romans,¹⁶ ancient Near Easterners,¹⁷ and Germanic tribes.¹⁸ Monetary sanctions have several objectives: specific and general deterrence, retribution, and rehabilitation.¹⁹ To the modern citizen, fines are routine and sensible. Lending moral weight to the punitive effects of economic sanctions, retributivists have long argued that offenders deserve to be punished, and punishment should be proportional to what is justly deserved.²⁰ Law and economics models argue that fines and penalties increase the transaction costs of committing crimes until they are inefficient rational

2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged.html, archived at <http://perma.cc/Z5YS-KJP3>. Low-level municipal citations and summonses may or may not be included in misdemeanor numbers, as they are frequently adjudicated without formal records, process, or dockets. See *infra* Part III.

¹⁴ In some cases these have become indistinguishable from misdemeanors, although in many misdemeanor cases defendants have a right to counsel. John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 2–5 (2013).

¹⁵ ATHENIAN CONST. pt. 7, §§ 61–69, THE AVALON PROJECT, <http://avalon.law.yale.edu/ancient/athe7.asp>, archived at <http://perma.cc/H9B8-G2C8> (last visited Nov. 3, 2015).

¹⁶ The Twelve Tables, Table III.2., THE AVALON PROJECT, http://avalon.law.yale.edu/ancient/twelve_tables.asp, archived at <http://perma.cc/TG96-N5X9> (last visited Oct. 30, 2015).

¹⁷ The law collections from ancient Sumer and Mesopotamia, e.g., Ur-Namma, Eshnunna, Lipit-Ishtar, and Hammurabi, are illustrative. See *generally* LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR (Martha T. Roth, trans., SBL Writings from the Ancient World Series, Scholars Press 1995) 13–35, 57–142, <http://www.g2rp.com/pdfs/LawCollectionsFromMesoPotamiaAndAsiaMinor.pdf>, archived at <http://perma.cc/YG4Z-ACZY>.

¹⁸ TACITUS, *GERMANY AND AGRICOLA* 27–28 (Oxford Translation rev. 1922).

¹⁹ See Sally T. Hillsman & Judith A. Green, *The Use of Fines as an Intermediate Sanction*, VERA INST. FOR JUST. 3–4 (1991), <http://www.vera.org/sites/default/files/resources/downloads/1565.pdf>, archived at <http://perma.cc/SRQ5-V4NK>. Restitution is the primary means by which fines become rehabilitative and correlate to a lower incidence of committing new crimes. Fines and fees paid to the State have no such correlation. Cynthia Kempinen, *Payment of Restitution and Recidivism*, 2 PENN. COMM’N ON SENTENCING RES. BULL. 4 (2002), <http://pcs.la.psu.edu/publications-and-research/research-bulletin/archive-of-previously-published-research-bulletins/2002-october.-payment-of-restitution-and-recidivism/view>, archived at <http://perma.cc/PW3J-NU9P>.

²⁰ See *generally* IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (Library of Liberal Arts rev. ed. 1965).

choices,²¹ deterring unwelcome social behavior. Yet fines have fallen in and out of favor throughout American history.

In colonial America, an emphasis on rehabilitation²² and distaste for the debtors' prisons of England²³ shifted sentencing away from punitive economic sanctions toward incarceration and probation.²⁴ Unlike fines, incarceration was seen as rehabilitative by promoting reflection and remorse.²⁵ Fines continued to be disfavored in the early and mid-twentieth century by model penal codes and sentencing guidelines.²⁶ The National Commission on Reform of Federal Criminal Laws strongly rejected fines unless "some affirmative reason indicates that a fine is peculiarly appropriate."²⁷ The American Law Institute's Model Penal Code (1962), the National Council on Crime and Delinquency Model Sentencing Act (1977), and the American Bar Association Standards Relating to Sentencing Alternatives and Procedures (1978) similarly preferred incarceration over fines for most offenses.²⁸ Judges, too, largely rejected meting out fines. They perceived fines as ineffective at impacting the behavior of the rich, for whom fines are too low to have much deterrent value,²⁹ and essentially unenforceable against the poor, who cannot pay them.³⁰

By the 1980s, however, attitudes began to shift as criminologists advocated for increased punitive sanctions for low-level offenses: the "broken windows" theory of urban deterioration. The broken windows theory ties minor criminal offenses to larger systems of social disorder.³¹ According to this argument, citations criminalizing unwanted (but not necessarily serious) behavior do more than punish and deter petty crimes—they also serve to

²¹ Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983).

²² George F. Cole, et al., *The Practices and Attitudes of Trial Court Judges Regarding Fines as a Criminal Sanction*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. 1 (1987), available at <https://www.ncjrs.gov/pdffiles1/Digitization/106270NCJRS.pdf>, archived at <http://perma.cc/VH5Q-PEZ6>.

²³ BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 2–3 (2002); see also Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 362 (2006).

²⁴ R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice*, 33 CRIM. JUST. & BEHAV. 242, 242 (2006).

²⁵ CALEB SMITH, THE PRISON AND THE AMERICAN IMAGINATION 82–85 (2014).

²⁶ Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 52 (1990).

²⁷ *Id.*; THE NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REP. OF THE NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS: ESTABLISHED BY CONGRESS IN PUB. LAW 89–801 296 (U.S. Gov't Printing Office, 1971) (commenting on § 3302 of the Federal Criminal Code), available at <http://www.ndcourts.gov/court/resource/CriminalCode/FinalReport.pdf>, archived at <http://perma.cc/C4FJ-SSN8>.

²⁸ Hillsman, *supra* note 26, at 52 n.2.

²⁹ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1201–02 (1985).

³⁰ Hillsman, *supra* note 26, at 54; Ruback & Bergstrom, *supra* note 24, at 243.

³¹ George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1, 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>, archived at <http://perma.cc/CR5Z-NMT2>.

maintain the social order in a way that discourages violent and high-level crime, benefiting the entire community. A large fine for littering, for example, not only discourages littering but also becomes a principal bulwark against more serious criminal activity by helping maintain the appearance of a law-abiding community. The broken windows theory took hold quickly and firmly; by the late 1980s, fines became the preferred sanction against criminal defendants, particularly for low-level municipal ordinance violations and petty misdemeanors. A 1987 study of lower courts found that fines were imposed in 86% of cases.³² By 1988, forty-eight states authorized some form of correctional fees.³³ Present-day fines not accompanied by incarceration or parole tend to be for traffic violations and petty, high-volume offenses.³⁴ Other offenses might include jaywalking, littering, disorderly conduct, trespass, or truancy.³⁵

Today, legal financial obligations are imposed on a substantial majority of those convicted of crimes, both petty and serious, each year.³⁶ The shift to fines as the primary enforcement tool against low-level offenses is largely attributable to two factors. First, LFOs are appealing because they are easy to administer and generate revenue. As the costs of enforcement and incarceration skyrocketed during the drug wars, public pressure to reduce costs prompted legislators to raise revenue by charging those who “use” the system—criminal offenders—with the costs of maintaining it. A staunchly anti-tax mentality resulted in drastic shortfalls in local and state budgets, exerting similar pressure on local leaders to explore new revenue streams, such as fines and fees. Second, the emergence of broken windows policing meant that law enforcement focused new resources and attention on low-level violations that might otherwise have gone unenforced, sweeping millions of people into the criminal justice system as state debtors.

A. Revenue Source

Fines and fees have the benefit of being lucrative revenue generators that can help recoup budget shortfalls and defray the costs of the corrections and criminal justice system in particular.³⁷ Incarceration is expensive. A single federal inmate in 2014 cost an average of \$30,619.85 per year, while a state or local inmate cost an average of \$28,999.25.³⁸ The averages obscure the extraordinary cost of incarceration in many major urban centers. In New

³² Hillsman, *supra* note 26, at 56.

³³ Eisen, *supra* note 6, at 322.

³⁴ Hillsman, *supra* note 26, at 50.

³⁵ See, e.g., Natapoff, *supra* note 13.

³⁶ Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010).

³⁷ See Ruback & Bergstrom, *supra* note 24, at 243.

³⁸ Annual Determination of Average Cost of Incarceration Notice, 80 Fed. Reg. 12523-01 (Mar. 9, 2015), <https://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=28109>, archived at <https://perma.cc/UF7S-3DS3>.

York City, for example, the average cost of housing, feeding, and clothing a single inmate for one year in jail was \$167,731.³⁹ In total, the costs of incarceration surpass \$39 billion annually.⁴⁰

Because these expenditures place enormous burdens on state and local budgets, states and municipalities have gained political traction by advocating that criminals themselves foot those costs.⁴¹ George Drake, an electronic monitoring consultant to government agencies, explained, “It’s very easy for jurisdictions to pass the cost on to the offender No one wants to raise taxes on the public. Politicians—it’s the last thing they want to do.”⁴² Similarly, some court administrators believe that charging defendants is only fair:

The only reason that the court is in operation and doing business at that point in time is because that defendant has come in and is a user of those services They don’t necessarily see themselves as a customer because, obviously, they’re not choosing to be there. But in reality they are.⁴³

Troublingly, however, it is not just serious criminals, but also those merely accused of crimes, as well as people guilty of only minor infractions, that must shoulder this burden.

Municipal fines and fees are substantial revenue generators, particularly for cities, towns, and counties that do not or cannot tax residents because tax increases are limited by state constitutions. In Missouri, for example, a 1980 amendment by the Taxpayer Survival Association barred municipalities from

³⁹ Marc Santora, *City’s Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html>.

⁴⁰ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. FOR JUST., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS ii (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>, archived at <http://perma.cc/2CSY-BN5M> (reflecting forty states that participated in the study).

⁴¹ See, e.g., *Nevada county’s plan to charge inmates for jail meals draws lawsuit threat*, ASSOCIATED PRESS (Feb. 8, 2014), <http://www.foxnews.com/us/2014/02/08/nevada-county-plan-to-charge-inmates-for-jail-meals-draws-lawsuit-threat/>, archived at <http://perma.cc/9ZDN-ED26> (“‘Why should the people of Elko County pay for somebody else’s meals in jail?’ said Commissioner Grant Gerber, a backer of the plan who thinks the fees should be higher.”); Laura Bauer, *Some inmates pay for their crimes and jail stays*, KANSAS CITY STAR (Apr. 24, 2009), <http://www.jocosherriff.org/modules/showdocument.aspx?documentid=47>, archived at <http://perma.cc/S54P-JVJD> (reporting Sheriff Jimmie Russell of Taney County Jail, Missouri, as explaining: “‘Why should the taxpayers have to pay; they didn’t do anything wrong Inmates committed the crime, and they should pay.’”); Nate Rawlings, *Welcome to Prison. Will You Be Paying Cash or Credit?*, TIME (Aug. 21, 2013), <http://nation.time.com/2013/08/21/welcome-to-prison-will-you-be-paying-cash-or-credit>, archived at <http://perma.cc/M8GP-KSQ2> (“Our inmate care, medical care, housing care, all those budgetary codes have escalated over the past several years, and it’s an unreasonable burden on our taxpayers. What we’re trying to do is shift the burden off the taxpayers’ back, to the inmates.”).

⁴² Joseph Shapiro, *Measures Aimed At Keeping People Out Of Jail Punish The Poor*, NPR (May 24, 2014), <http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor>.

⁴³ Shapiro, *supra* note 11 (quoting Michael Day, the administrator for the Allegan County Circuit Court).

raising taxes without a citywide referendum.⁴⁴ Fines and fees, on the other hand, can be raised at the discretion of the city.⁴⁵ The result is that despite being home to Emerson Electric, a Fortune 500 company that earns \$24 billion a year, Ferguson, Missouri, raises only \$68,000 a year in property taxes from the company's 152-acre corporate headquarters.⁴⁶ As a consequence of these limitations, fines may be the largest—or only—source of revenue for the operation of local government.⁴⁷

A large percentage of low-level fines are traffic citations, such as speeding and parking tickets. Dependence on traffic citations to fund local government creates a troubling incentive for law enforcement to issue as many citations and fines as possible, regardless of the severity of the offense or indigency of the offender. Truancy fines, which are imposed on students and parents when the former miss a certain amount of school, are a rising source of local revenue. In Dallas, for instance, five truancy courts brought in over \$2 million in revenue in 2009, and \$1.8 million in 2011.⁴⁸ That money was shared with school districts, creating incentives for schools to refer even excused absences to the judicial system.⁴⁹

Such revenue systems are subject to abuse and corruption when raising funds replaces public safety as the primary goal of law enforcement. One example of such abuse occurred in Ferguson, Missouri.⁵⁰ In September 2014, reports of racial bias in the police force and allegations that bias caused the shooting death of an unarmed teenager, Michael Brown, prompted a Department of Justice investigation into the city's police practices.⁵¹ Among its findings, the DOJ found that Ferguson relied heavily on fines and fees to fund its general operating budget, and that city officials made maximizing revenue through fines and fees a top priority for law enforcement.⁵² In fact, city officials worked closely with law enforcement to

⁴⁴ Walter Johnson, *Ferguson's Fortune 500 Company*, THE ATLANTIC (Apr. 26, 2015), <http://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/>, archived at <http://perma.cc/A9J9-LWW3>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See, e.g., Karen Aho, *The Town That Lived Off Speeding Tickets*, FOX BUS. (Oct. 21, 2011), <http://www.foxbusiness.com/personal-finance/2011/10/19/town-that-lived-off-speeding-tickets/>, archived at <http://perma.cc/H529-DVJU>.

⁴⁸ However, note that creating and funding the truancy courts added to the city's expenses. Deborah Fowler, deputy director of the advocacy organization Texas Appleseed, described the irony this way: "They've developed a whole system in Dallas that has to feed itself to justify its existence." Annette Fuentes, *The Truancy Trap*, THE ATLANTIC (Sept. 5, 2012), <http://www.theatlantic.com/national/archive/2012/09/the-truancy-trap/261937/>, archived at <http://perma.cc/3JLN-XVAK>.

⁴⁹ *Id.*

⁵⁰ For a discussion of the relevance and importance of the Ferguson report, see *infra* Part II.A.

⁵¹ See generally U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T (Mar. 4, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf, archived at <http://perma.cc/8QVV-ZFT4> [hereinafter DOJ FERGUSON REPORT].

⁵² *Id.* at 2, 9–15.

conceive of new ways to increase fines and code enforcement, setting fee revenue targets based on funding needs rather than crafting enforcement practices based on public safety concerns.⁵³ City officials,⁵⁴ prosecutors,⁵⁵ police,⁵⁶ and even judges⁵⁷ worked in concert to maximize revenue.⁵⁸

Disturbingly, the proportion of the city budget in the St. Louis area that was generated by fines and fees was inversely proportional to the wealth of the municipality, and, by extension, the percentage of African Americans in the community.⁵⁹ Pine Lawn, Missouri, which is 96% black and had a per capita income of \$13,000 per year, took in \$1.7 million in fines and fees.⁶⁰ The neighboring affluent and 86% white suburb of Chesterfield, Missouri,⁶¹ however, home to five times greater a population and a per capita income of \$50,000 per year, brought in only \$1.2 million in fines.⁶² These revenue-based law enforcement practices thus disproportionately impact poor, black residents in the St. Louis area and likely do the same in other cash-strapped cities. In an attempt to curb such abuses, Missouri now bars local governments from using traffic fines to fund more than 20% of their general operating budgets.⁶³

⁵³ *Id.* at 10.

⁵⁴ *Id.* at 13–14 (“[T]he Finance Director recommended immediate implementation of an ‘I-270 traffic enforcement initiative’ in order to ‘begin to fill the revenue pipeline.’ . . . The Finance Director stated that ‘there is nothing to keep us from running this initiative 1, 2, 3, 4, 5, 6, or even 7 days a week. Admittedly at 7 days per week[] we would see diminishing returns.’”).

⁵⁵ *Id.* at 14 (“Indeed, the acting prosecutor noted in the report that ‘I have denied defendants’ needless requests for continuance from the payment docket in an effort to aid in the court’s efficient collection of its fines.’”).

⁵⁶ *Id.* at 11 (“The Captain of FPD’s Patrol Division regularly communicates with his Division commanders regarding the need to increase traffic ‘productivity,’ and productivity is a common topic at squad meetings.”).

⁵⁷ *Id.* at 15 (“In 2012, a Ferguson City Councilmember wrote to other City officials in opposition to Judge Brockmeyer’s reappointment, stating that ‘[the Judge] does not listen to the testimony, does not review the reports or the criminal history of defendants, and doesn’t let all the pertinent witnesses testify before rendering a verdict.’ The Councilmember then addressed the concern that ‘switching judges would/could lead to loss of revenue,’ arguing that even if such a switch did ‘lead to a slight loss, I think it’s more important that cases are being handled properly and fairly.’ The City Manager acknowledged mixed reviews of the Judge’s work but urged that the Judge be reappointed, noting that ‘[i]t goes without saying the City cannot afford to lose any efficiency in our Courts, nor experience any decrease in our Fines and Forfeitures.’”).

⁵⁸ *Id.* at 9–15.

⁵⁹ See ArchCity Defenders, *Municipal Courts White Paper* 9 (2014), available at <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>, archived at <http://perma.cc/57GX-V557>.

⁶⁰ *Id.* at 9–10.

⁶¹ *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US2913600, archived at <https://perma.cc/Q6LC-BPG3> (last visited June 26, 2015).

⁶² ArchCity Defenders, *supra* note 59, at 12.

⁶³ The cap originally was 30% statewide. DOJ FERGUSON REPORT at 14. Following the release of the Ferguson Report, Missouri lawmakers passed legislation that further reduced the maximum amount of retainable revenue from traffic violations in Missouri to 20%, and in the St. Louis area to 12.5%. Mitch Smith, *Missouri Lawmakers Limit Revenue From Traffic Fines*

Further, there is no evidence that the public benefits from law enforcement's prioritization of revenue generation. Ferguson police routinely conducted stops that had "little relation to public safety and a questionable basis in law."⁶⁴ The city council and police squads used words like "volume" and "productivity" to discuss increased stops, citations, fines, and fees, and pressured officers both directly and indirectly to boost their "productivity" and "volume" if they wanted to get raises or promotions.⁶⁵ Officers who failed to generate revenue were subject to worse assignments and even discipline.⁶⁶ These practices violate the law, undermine community trust, and do nothing to advance public safety.⁶⁷

As we emerge from a serious economic recession and lower tax bases from which to draw revenue, it is no surprise that localities have turned to LFOs to finance the daily operation of government. Fines and fees allow legislators to avoid raising general taxes and thus avoid raising the ire of cash-strapped constituents. But as reported in Ferguson, fines and fees also create perverse incentives to over-police.

B. Broken Windows

Another key factor in the shift to heavy reliance on fines and fees is the policing revolution brought by "broken windows." The broken windows theory of criminology connects minor criminal offenses to larger systems of social disorder.⁶⁸ The idea is that the sight of minor instances of urban decay, such as graffiti, trash, or a broken window, signals that the community is indifferent to potentially negative neighborhood activity and encourages more of it.⁶⁹ A building with one broken window, left unrepaired, quickly becomes a building with many broken windows.⁷⁰

The broken windows model of policing is dominant in many major urban centers, particularly in New York City. Police Commissioner Bill Bratton has vigorously embraced and defended incorporating broken windows

in *St. Louis Area*, N.Y. TIMES (May 8, 2015), <http://www.nytimes.com/2015/05/09/us/mis-missouri-lawmakers-agree-to-limit-revenue-from-traffic-fines.html>. Missouri is not alone in capping such revenue. In Texas, almost all traffic revenue above 30% of the annual budget must be given to the state. TEX. TRANSP. CODE § 542.402(b-1)-(b-2) (2011).

⁶⁴ DOJ FERGUSON REPORT at 11.

⁶⁵ *Id.*

⁶⁶ *Id.* at 12.

⁶⁷ *Id.* at 15 ("Ferguson's strategy of revenue generation through policing has fostered practices in the two central parts of Ferguson's law enforcement system—policing and the courts—that are themselves unconstitutional or that contribute to constitutional violations. . . . Ultimately, unlawful and harmful practices in policing and in the municipal court system erode police legitimacy and community trust, making policing in Ferguson less fair, less effective at promoting public safety, and less safe.").

⁶⁸ Kelling & Wilson, *supra* note 31.

⁶⁹ *Id.*

⁷⁰ *Id.*

into his tenure.⁷¹ While New York's stop-and-frisk program has garnered the most attention, aggressive policing of low-level "quality of life" crimes was a critical factor in the death of Eric Garner.⁷² Garner, an African American man from Staten Island, died while being arrested for the sale of "loosies," or loose untaxed cigarettes.⁷³ New York's congressional delegation later wrote to Attorney General Eric Holder about Garner's death and highlighted the city's "broken windows policing strategy that appears to target communities of color for the enforcement of minor violations and low-level criminal offenses."⁷⁴ New York City issued 450,000 summonses in 2013, with the most frequent offenses being public consumption of alcohol, public urination, disorderly conduct, and riding a bicycle on the sidewalk.⁷⁵

Academics have heavily criticized the efficacy of the broken windows theory. Numerous sociologists and researchers have analyzed the same data that James Q. Wilson and George L. Kelling used in their influential article, with mixed results.⁷⁶ Recent research suggests that reductions in criminal activity claimed to be the result of aggressive broken windows policing are actually incidents of mean reversion: "What goes up must come down."⁷⁷ Crime was at a high everywhere when broken windows was implemented, and crime has since settled back to a mean or average, irrespective of policing practices.⁷⁸ Cities that did not noticeably alter their police practices, such as Los Angeles and San Diego, nevertheless experienced similar drops in crime as those that did, like New York City.⁷⁹ Today, Ronald L. Davis, head of the Department of Justice's Office of Community Oriented Policing Services, denies that increased stops and law enforcement encounters reduce crime.⁸⁰

Crime, then, may not relate as strongly to environment as Wilson and Kelling assumed. A randomized experiment by the Department of Housing and Urban Development known as "Moving to Opportunity" gave vouchers

⁷¹ Laila Kearney, *NYC police commissioner defends 'broken windows' policing but will compromise*, REUTERS (Apr. 30, 2015), <http://www.reuters.com/article/2015/04/30/us-usa-police-new-york-idUSKBN0NL2JS20150430>, archived at <http://perma.cc/CUG3-UEFD>.

⁷² Peters, *infra* note 78.

⁷³ James Wolcott, *The Other Cultural Forces Behind Police Brutality*, VANITY FAIR (July 2015), <http://www.vanityfair.com/culture/2015/06/police-deaths-baltimore-ferguson-james-wolcott>, archived at <http://perma.cc/M7XM-54D8>.

⁷⁴ Letter from Hakeem Jeffries et al. to Eric Holder, U.S. Attorney General (Aug. 12, 2014), <http://www.nytimes.com/interactive/2014/08/14/nyregion/garner-doc.html>.

⁷⁵ Kearney, *supra* note 71.

⁷⁶ Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006).

⁷⁷ *Id.* at 276.

⁷⁸ Justin Peters, *Broken Windows Policing Doesn't Work*, SLATE (Dec. 3, 2014), http://www.slate.com/articles/news_and_politics/crime/2014/12/broken_windows_policing_doesn_t_work_it_also_may_have_killed_eric_garner.html, archived at <http://perma.cc/9R68-NKHK>.

⁷⁹ *Id.*

⁸⁰ Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?_r=1.

to low-income families to move to neighborhoods with less disorder and crime.⁸¹ The broken windows theory would assume that the change in neighborhood would decrease their chances of criminal activity, but the program found no such reduction in individual criminal behavior.⁸² While perceived disorder does have a negative effect on people's emotional and psychological well-being, what is perceived as "disorder" is strongly associated with race and class, irrespective of the particular disorderly conduct observed.⁸³ It is not necessarily the so-called "disorder" that creates the negative feelings, but rather "the associations of disorder with residents' perceptions of their racial meaning. . . . [I]t may well be that reducing actual levels of disorder will not remedy psychological discomfort, for that discomfort stems from more insidious sources."⁸⁴ Heavily policing low-level offenses is met with community approval, then, not because it actually makes the neighborhood safer, but rather because it targets the poor and people of color, feeding unacknowledged and unconscious racial and class bias.

Subconscious biases affect not only community perception, as in what a community member perceives as "disorder," but police discretion as well. Under the auspices of broken windows policing, neighborhoods and people are not fined, summonsed, or arrested equally. Fines and fees are disproportionately assessed against minorities. Police are called to affluent neighborhoods when absolutely necessary (say, a 911 report), while police are expected to be "self-initiating" in poorer African-American neighborhoods, actively writing tickets, or "giving activity."⁸⁵ In Tampa Bay, Florida, for example, the city issued over 10,000 bicycle tickets, but 79% of them were issued to African Americans, who make up only a quarter of the Tampa population.⁸⁶ Only one ticket was issued in each of two affluent, white neighborhoods, and both went to black men.⁸⁷ In DeKalb County, Georgia, African Americans represent about half of the population yet make up nearly

⁸¹ Harcourt & Ludwig, *supra* note 76, at 276–77.

⁸² *Id.* at 277. However, Moving to Opportunity did not aggressively desegregate neighborhoods and most relocations were to other majority-minority low-income areas. A Chicago program aimed specifically at relocating poor families to wealthier and whiter neighborhoods saw improved outcomes in terms of employment and college achievement. Unlike Moving to Opportunity, though, there was no control group, crime level was not analyzed, and participants were screened, so it is difficult to adopt broader conclusions. Alana Semuels, *Is Ending Segregation the Key to Ending Poverty?*, THE ATLANTIC (Feb. 3, 2015), <http://www.theatlantic.com/business/archive/2015/02/is-ending-segregation-the-key-to-ending-poverty/385002/>, archived at <http://perma.cc/96Q4-BE4T>.

⁸³ Robert J. Sampson & Stephen Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of 'Broken Windows'*, 67 SOC. PSYCHOL. Q. 319, 319–20 (2004).

⁸⁴ *Id.* at 327.

⁸⁵ Matt Taibbi, *Why Baltimore Blew Up*, ROLLING STONE (May 26, 2015), <http://www.rollingstone.com/politics/news/why-baltimore-blew-up-20150526>, archived at <http://perma.cc/U9N6-FN6T>.

⁸⁶ Alexandra Zayas & Kameel Stanley, *How riding your bike can land you in trouble with the cops — if you're black*, TAMPA BAY TIMES (Apr. 17, 2015), <http://www.tampabay.com/news/publicsafety/how-riding-your-bike-can-land-you-in-trouble-with-the-cops—if-youre-black/2225966>, archived at <http://perma.cc/EYK4-67Z9>.

⁸⁷ *Id.*

the entire population being jailed for their poverty.⁸⁸ Police officers in North Carolina conducted discretionary searches of cars belonging to black motorists two times more often than white motorists, despite the fact that white drivers were found with drugs and contraband “significantly more often.”⁸⁹ And in Ferguson, Missouri, African Americans were 67% of the population yet accounted for 90% of citations and 93% of arrests.⁹⁰ Where police have the authority to enforce every minor criminal infraction, they also have discretion to choose whether to exercise it. Discretion appears at every level of a police interaction: from whether an officer believes that a law has been violated at all, to whether she chooses to give merely a warning, to the severity of the offense for which the ticket is ultimately issued.⁹¹ It appears that officers are less likely to use this discretion in the defendant’s favor by giving a warning or “break” (lower fine) when the subject is a person of color.⁹²

The mixed temperature of modern thought on broken windows and strong alternate theories of the causes and effects of urban disorder are reason enough to abandon it as a law enforcement strategy. The disproportionate effect on minorities—an effect that is due in part to subconscious biases that influence when an officer chooses to pursue a ticket over a warning—is another, perhaps more persuasive reason. As this Note explains *infra* in Part IV, the devastating and real human costs of such policies far outweigh any theoretical and marginal benefits to be gained by an outmoded, outdated, and frequently refuted social theory.

⁸⁸ Allie Gross, *In Georgia, a Traffic Ticket Can Land You in the Slammer*, MOTHER JONES (Feb. 26, 2015), <http://www.motherjones.com/politics/2015/02/georgia-probation-misdemeanor-poor-jail>, archived at <http://perma.cc/EYK4-67Z9>.

⁸⁹ LaFraniere & Lehren, *supra* note 80. The New York Times uncovered “wide racial differences in measure after measure of police conduct” after analyzing tens of thousands of traffic stops and years of arrest data from Greensboro, North Carolina. *Id.* Similar disparities were found across North Carolina and in at least six other states. *Id.*

⁹⁰ DOJ FERGUSON REPORT at 62.

⁹¹ GEORGE L. KELLING, NAT’L INST. OF JUST., “BROKEN WINDOWS” AND POLICE DISCRETION 22–23, 35–37 (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/178259.pdf>, archived at <http://perma.cc/DE6Q-JLUL>; see also LaFraniere & Lehren, *supra* note 80 (“[T]raffic codes are so minutely drawn that virtually every driver will break some rule within a few blocks, experts say. ‘The traffic code is the best friend of the police officer,’ said David A. Harris, a University of Pittsburgh law professor who studies police behavior and search-and-seizure law.”)

⁹² Nejat Anbarci & Jungmin Lee, *Discretionary Behavior and Racial Bias in Issuing Traffic Tickets* 2–4 (Florida Int’l Univ., Working Paper, 2008), available at <http://economics.fiu.edu/research/working-papers/2008/08-04/08-04.pdf>, archived at <http://perma.cc/PJQ3-BXSE>; Richard G. Greenleaf et al. *Race-Based Decisions: Traffic Citations and Municipal Court Dispositions*, 8 JUST. POL’Y J. 1, 22–23 (2011), available at http://www.cjcg.org/uploads/cjcg/documents/Race-based_decisions.pdf, archived at <http://perma.cc/A9G6-ZPCR>; LaFraniere & Lehren, *supra* note 80.

PART II: MODERN DEBTORS' PRISONS

Today, poor people face excessively high, unconstitutionally imposed, and often illegally collected economic sanctions. Irrational policy choices and blatant constitutional violations have created pockets of abuse around the country. The effect is a system of modern day debtors' prisons, where indigent citizens are policed for minor offenses, fined beyond their means, and eventually jailed for nonpayment of these fines. These practices are not applied equally: municipal fines are disproportionately assessed against people of color and in predominantly minority communities.

First, excessively high sanctions are routinely imposed on petty violations. These fines both lack proportionality to the crime committed and create an insurmountable burden to poor defendants who cannot pay. Procedural deficiencies, such as failure to appear, become new charges with new fines or result in collateral consequences, such as suspension of a license (which, if the defendant is caught continuing to drive, will amount to yet another offense). Fines and offenses snowball into unpayable debts, and nonpayment can result in incarceration. Once made enforceable by the court system, collection is often abetted by sheriffs and constables with coercive authority, or outsourced to unregulated private companies that harass citizens for more than the original fines. Defendants may also be charged additional fees for paying in installments—an option only the poor require. Finally, some areas offered debtors the option of “voluntarily” serving jail time to pay off fees, a troubling scenario where those unable to pay must leave their families and risk losing their homes and jobs for petty crimes.

A. *Excessive Fines and Fees*

Many fines and fees assessed today are excessive both in cost, amounting to hundreds, if not thousands, of dollars for petty violations, and application, as evidenced by overzealous enforcement of minor ordinances. I use Ferguson, Missouri, as an example throughout this Section because the detailed Department of Justice investigation sheds incredible light on modern civil fine practices.⁹³ The investigation revealed not just the operation and effect of these practices, but also, in many cases, the specific machinations and reasoning that motivated such a scheme, and the various levels of management and review. I do not argue that Ferguson represents the worst or the most typical abuses, and do not attempt a robust case study. Rather, Ferguson provides a unique window into the incentives, agendas, and day-

⁹³ See generally DOJ FERGUSON REPORT. While I discuss findings in many other cities and states, few investigations have been as extensive as the one into Ferguson. As a result, more information is available about fines and fees in Ferguson, Missouri, than any other municipality.

to-day workings of an aggressive fine and fee scheme, and illustrates policies that may be taking place in municipalities across the country.

Fines in Ferguson were outrageously high, and city officials knew it.⁹⁴ The city investigated, reported on, and then used as a floor the fine and fee amounts set by neighboring counties.⁹⁵ Nearly every one of Ferguson's fines and fees surpassed those of its neighbors.⁹⁶ While parking fines in other municipalities ranged from \$5 to \$100, the fine in Ferguson was \$102.⁹⁷ Ferguson charged twice the median amount that seventy surrounding municipalities charged for Failing to Provide Proof of Insurance.⁹⁸ Having weeds or tall grass on one's property resulted in a fine as low as \$5 in one city but cost \$77 to \$102 in Ferguson.⁹⁹ The DOJ investigation found instances where the court "charged \$302 for a single Manner of Walking violation; \$427 for a single Peace Disturbance violation; \$531 for High Grass and Weeds; \$777 for Resisting Arrest; and \$792 for Failure to Obey, and \$527 for Failure to Comply, which officers appear to use interchangeably."¹⁰⁰ Perhaps most troublingly, an acting prosecutor "had reviewed the City's 'high volume offenses' and 'started recommending higher fines on these cases, and recommending probation only infrequently.'"¹⁰¹ The city, thus, not only knew its fines were out of proportion to what was reasonably expected in other places, but also knew that they were deliberately crafted to ensure that high-volume offenses generated as much income as possible.

Enforcement was likewise extreme. Though Missouri requires that individuals have a mandatory court appearance every three violations, Ferguson mandated that a defendant appear in the first instance for 229 of its 376 municipal violations, even if the defendant was not disputing the charge.¹⁰² "Failure to Appear" at the hearing that imposed the sanction was *itself* a violation and carried its own fines and fees: \$75.50, plus \$26.50 in court costs.¹⁰³ Not appearing also resulted in the court issuing an arrest warrant.¹⁰⁴ Residents who failed to appear even once confronted a paradox for subsequent offenses: appear for the new offense, but risk arrest and jail time; or

⁹⁴ *Id.* at 10. Ferguson was not alone in this. Neighboring Pine Lawn passed a law charging \$100 to \$500 for "saggy pants." *Saggy Pants Ban May Not Be Constitutional*, ASSOCIATED PRESS (Dec. 3, 2007), <http://www.cbsnews.com/news/saggy-pants-ban-may-not-be-constitutional/>, archived at <http://perma.cc/JHS3-6GM8>.

⁹⁵ DOJ FERGUSON REPORT at 10.

⁹⁶ A report drafted by the city's Finance Director in February 2011 "noted with approval that Ferguson's fines are 'at or near the top of the list.'" *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 52. Ferguson charged \$375 for this violation. Among the seventy surrounding municipalities, the average was \$186 and the median was \$175.

⁹⁹ *Id.* at 10.

¹⁰⁰ *Id.* at 52.

¹⁰¹ *Id.* at 10.

¹⁰² *Id.* at 48 (listing among those violations requiring a court appearance: Dog Creating Nuisance, Equipment Violations, No Passing Zone, Housing—Overgrown Vegetation, and Failed to Remove Leaf Debris).

¹⁰³ *Id.* at 42; FERGUSON MUN. CODE § 13-58 (repealed Sept. 23, 2014).

¹⁰⁴ DOJ FERGUSON REPORT at 9.

fail to appear again and accrue additional fines.¹⁰⁵ Ultimately, this practice allowed jail time for underlying offenses that could not otherwise impose jail time.¹⁰⁶ And while the court lacked authority to impose a fine of more than \$1,000 for any particular offense, accumulated fines, fees, Failure to Appear charges, and forfeited bond payments meant citizens routinely wound up owing and paying more than \$1,000 for a single infraction.¹⁰⁷

Payment plans began at \$100 per month, an unusually high and often unaffordable amount for poorer residents, while a single missed payment led to the immediate issuance of a warrant for the defendant's arrest.¹⁰⁸ Bond amounts were extraordinary: \$200 for up to four traffic offenses, \$100 for every traffic offense thereafter, and an additional \$100 for every Failure to Appear.¹⁰⁹ In total, bond amounts often exceeded the original fine and all associated fees. Those unable to afford bond were incarcerated for up to 72 hours¹¹⁰ despite there being no public safety need for incarceration.¹¹¹ Those who paid bonds but missed two subsequent court dates or payments forfeited their bond amounts, which then were not applied to their outstanding fines.¹¹² Ferguson used arrest warrants as the "primary tool for collecting outstanding fines for municipal code violations."¹¹³ The Missouri Municipal Court Handbook implicitly encouraged this practice, noting that "[d]efendants who fail or refuse to pay their fines and costs can be extremely difficult to deal with, but if there is a credible threat of incarceration if they do not pay, the job of collection becomes much easier."¹¹⁴

In one instance, a woman who had illegally parked her car received two citations for the same incident, which included an attendant fine of \$151 plus fees.¹¹⁵ Between 2007 and 2010, she was further fined for failing to appear seven times.¹¹⁶ Each time she failed to appear, fines and fees were added to the existing violation, and an arrest warrant was issued.¹¹⁷ Ultimately, over the course of seven years, the woman was "arrested twice, spent six days in jail, and paid \$550 to the court for the events stemming from this single instance of illegal parking."¹¹⁸ As of December 2014, she was still making payments, and though the original fine was only \$151 and she had since paid \$550, she still owed \$541.¹¹⁹

¹⁰⁵ *Id.* at 49.

¹⁰⁶ *Id.* at 42–43.

¹⁰⁷ *Id.* at 43.

¹⁰⁸ *Id.* at 52 (noting that no notice or leave to contest is given).

¹⁰⁹ *Id.* at 59.

¹¹⁰ *Id.* at 60.

¹¹¹ *Id.*

¹¹² *Id.* at 61.

¹¹³ *Id.* at 55.

¹¹⁴ *Id.* at 56 n.31.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The woman in question was in dire financial straits and often homeless.¹²⁰ Her lack of a permanent address meant it was unlikely she would receive the summonses indicating that she must appear in court—resulting in more charges, more fines, and more warrants. She twice attempted to make small partial payments, but the court refused to accept anything less than payment in full.¹²¹ Refusal to accept partial payment again punishes those too poor to pay enormous court costs all at once, and ensures that those in financial distress fail to pay their fines and thus continue to face additional fines. The issuance of warrants for this woman, based on the suspect criminal charge of failing to appear in court, meant she faced an untenable proposition: pay money she did not have to a municipality exploiting her poverty, or face jail time.

Excessive fines are not exclusive to Ferguson, Missouri, or even to criminal matters. In Pagedale, Missouri, city officials aggressively fined residents if they did not make costly home repairs, such as painting gutters, adding curtains and shades, or adjusting noncompliant fences, hedges, roofs, and visible dish antennas.¹²² In Sylacauga, Alabama, Tim Fugatt and his wife were arrested by police under threat of a Taser for driving with an expired license plate to see their terminally ill son.¹²³ In Harpersville, Alabama, a disabled woman was fined \$745 for driving without proof of insurance and with a suspended license.¹²⁴ She ultimately served seven weeks in jail as her debt grew into the thousands.¹²⁵ An emerging trend is the use of “truancy fees” to coerce parents and children into attending school. In 2011, the Public Interest Law Center and NAACP filed suit against Pennsylvania’s Lebanon School District for a truancy “ticketing spree” it promoted from 2005 to 2010.¹²⁶ The district referred 8,000 truancy violations to the judicial system and collected \$1.3 million in fines—often far more per student and family than the \$300 limit set by Pennsylvania law.¹²⁷

With such a broad swath of behavior amounting to criminal activity,¹²⁸ and so many of Ferguson’s citizens unable to afford the mounting legal debt,

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. TIMES (Nov. 4, 2015), http://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html?_r=0.

¹²³ Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>, archived at <http://perma.cc/R7Y7Z-QG8M>.

¹²⁴ Hannah Rapplepe & Lisa Riordan Seville, *The Town That Turned Poverty Into a Prison Sentence*, THE NATION (Mar. 14, 2014), <http://www.thenation.com/article/178845/town-turned-poverty-prison-sentence>, archived at <http://perma.cc/433A-YXPU>.

¹²⁵ *Id.*

¹²⁶ Fuentes, *supra* note 48.

¹²⁷ *Id.*

¹²⁸ While the violations discussed *infra* in this Note are so broad or vague that they ensnared three-quarters of Ferguson’s population, overcriminalization is true even for serious crimes and even outside of Ferguson. Professor Douglas Husak suggests that 70% of American adults have, usually unwittingly, committed a crime for which they could be imprisoned.

these mass enforcement schemes created an enormous number of outstanding arrest warrants. While the population of Ferguson was only approximately 21,000 people,¹²⁹ over 16,000,¹³⁰ or the equivalent of *three-quarters of the town's population*, had outstanding arrest warrants. Conditions were worse in some neighboring Missouri towns. As of June 30, 2013, Pine Lawn had 23,457 outstanding arrest warrants, or 7.3 *per resident*, while Country Club Hills had over 33,000 outstanding warrants, or 26 per resident.¹³¹ In Benton County, Washington, about a quarter of people in jail for misdemeanors on any given day were there because they were unable to pay a state-mandated fine or fee.¹³² Yet excessively high fines and fees are often just the beginning. When these debts are turned over to private collection companies, additional fines and fees and unscrupulous collection tactics compound abuses.

B. Collection Abuses

Cities and towns have increasingly found ways to make the collection of outstanding fees just as punitive as the fees themselves. This includes the proliferation of additional fees for repayment and default, including charges to enter into a payment plan, as well as late penalties, interest, and surcharges. These fees balloon further when municipalities outsource collection to private, for-profit corporations, which have little oversight and often employ aggressive intimidation tactics to coerce repayment.

Payment plan fees are perhaps the most perplexing, as those least able to pay in full must utilize them. Some fees are modest—\$10 in Virginia—but others are much higher, such as \$25 (or, alternately, \$5 per month) in Florida and \$100 in New Orleans.¹³³ Again, those without means are forced to pay more, and suffer more, than those with means. Late fees are charged by nearly every jurisdiction,¹³⁴ and can accumulate quickly. California charges a flat late fee of \$300, while parts of Florida charge \$10 or \$20 for

DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 24 (2008); see also Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013) (“[S]ince . . . everyone is a criminal if prosecutors look hard enough, they are guaranteed to find something eventually.”). See generally GENE HEALY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (2004); HARVEY SILVERGATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

¹²⁹ *Race and Hispanic or Latino Origin: 2010*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF1/QTP3/1600000US2923986, archived at <http://perma.cc/Q3GX-F24H> (last visited June 26, 2015).

¹³⁰ DOJ FERGUSON REPORT at 55.

¹³¹ Radley Balko, *How municipalities in St. Louis County, Mo., profit from poverty*, WASH. POST (Sept. 3, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>, archived at <http://perma.cc/89N6-9BNE>.

¹³² Shapiro, *supra* note 11.

¹³³ ALICIA BANNON ET AL., *CRIMINAL JUSTICE DEBT: A BARRIER TO RE-ENTRY* 18 (2010).

¹³⁴ *Id.* at 1 (noting that late fees were charged by fourteen of the fifteen jurisdictions surveyed).

each missed payment.¹³⁵ Michigan charges a proportional fee: 20% after 56 days of nonpayment.¹³⁶ Collection fees and interest on carceral debt can also be significant. Alabama allows a 30% collection penalty on fines unpaid for 90 days; Florida permits 40%.¹³⁷ All the while, interest may be accruing concurrently. In Illinois, the interest on outstanding fines is 9%, in *addition* to its 30% penalty past-due fee,¹³⁸ and in Washington State, interest is a staggering 12% per year on top of a \$100 collection fee per year.¹³⁹

At least one locality improperly coerced incarcerated defendants into “working off” their debts by completing menial labor for the city itself. In Montgomery, Alabama, those too poor to pay fines, who had been unlawfully imprisoned for their nonpayment, were offered financial “incentives” to complete janitorial tasks.¹⁴⁰ Though the city credited all those imprisoned at a rate of \$50 a day for serving jail time, it offered an additional \$25 per day if inmates cleaned city offices, scrubbed feces and blood from jailhouse floors, or wiped down the very bars imprisoning them.¹⁴¹ Attorneys for the defendants argued that this practice violated the Thirteenth Amendment’s prohibition on slavery and forced labor.¹⁴² Such “work” programs are particularly troubling given their resemblance to Reconstruction-era convict-leasing schemes that essentially perpetuated slavery.¹⁴³ With convict-leasing, jails hired out poor African Americans, imprisoned for petty or imaginary crimes such as “vagrancy,” to perform labor for private industry.¹⁴⁴

Private collection companies, licensed by the state to collect outstanding debts, inflict some of the most serious abuses upon low-income debtors. The American Civil Liberties Union recently settled a federal lawsuit against DeKalb County, Georgia,¹⁴⁵ for its use of a private commercial collection company to force poor defendants to pay off municipal fines and fees.¹⁴⁶ The named plaintiff, Kevin Thompson, was fined \$810 for speeding and driving with an expired license.¹⁴⁷ When he could not pay the fine because

¹³⁵ *Id.* at 17.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 730 ILL. COMP. STAT. 5/5-9-3(e) (2014).

¹³⁹ AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN DAY DEBTORS’ PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 6–7 (2014), available at <https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor's%20Prison%20Final%20%283%29.pdf>, archived at <http://perma.cc/9ELF-8TVK>.

¹⁴⁰ Complaint at 1–2, Mitchell v. Montgomery, No. 14-cv-186 (M.D. Ala. Mar. 23, 2014).

¹⁴¹ *Id.*

¹⁴² *Id.* at 19–20.

¹⁴³ See generally DOUGLAS BLACKMON, SLAVERY BY ANY OTHER NAME (2008).

¹⁴⁴ *Id.*

¹⁴⁵ Settlement Agreement, Thompson v. DeKalb Cty., No. 1:15-mi-99999-UNA (N.D. Ga. Mar. 18, 2015). Ironically, Georgia was originally founded as a colony for English debtors escaping debtors’ prisons. Sarah Dolisca Bellacicco, Note, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors’ Prison System*, 48 GA. L. REV. 227, 234 (2013).

¹⁴⁶ Complaint, Thompson v. DeKalb Cty., No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015).

¹⁴⁷ *Id.* ¶ 4.

he was unemployed, he was assigned thirty days of “pay-only” probation and referred to a for-profit collection company, Judicial Correction Services, Inc. (“JCS”).¹⁴⁸ Thompson borrowed money from family and paid \$85—\$30 of which the company retained as its own fee—only to have his probation revoked when he could make no further payments.¹⁴⁹ Then, owing \$838 in fines and fees, Thompson was incorrectly told he would have to pay an additional \$150 for a public defender (the fee was only \$50 and was waivable), and so he waived his right to counsel because, again, he could not afford it.¹⁵⁰ The judge sentenced him to nine days in jail for violation of his probation, and he served five days.¹⁵¹

Similarly, Harriet Cleveland, a forty-nine-year-old Alabamian mother of three, first began getting traffic tickets in 2008, when police set up a roadblock in her neighborhood.¹⁵² She worked only part-time at a daycare center and could not afford to renew her license or insure her car, and so, regularly, Cleveland found herself ticketed and fined for driving with a suspended license and without insurance.¹⁵³ Her initial tickets amounted to hundreds of dollars, and unable to pay, Cleveland was referred to JCS for collection.¹⁵⁴ She was told to pay \$200 per month, though only \$160 would go toward her fines and fees—the rest was kept by JCS.¹⁵⁵ For over two years Cleveland made payments, but after losing work and even turning over her entire tax rebate, she found herself drowning in debt.¹⁵⁶ She owed \$2,713, including a warrant fee, surcharges, and a 30% collection fee.¹⁵⁷ When she stopped making payments, JCS began contacting relatives and friends, demanding payment or else threatening Cleveland with jail time.¹⁵⁸ A judge told her that she must pay the amount owed or serve thirty-one days in jail. She served ten days before the Southern Poverty Law Center was able to secure her release.¹⁵⁹

Thompson and Cleveland are not unique.¹⁶⁰ Georgia employs private companies to monitor 80% of its misdemeanor probation services.¹⁶¹ “Pay only” probation is not true probation, which is an alternative to a jail or

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶¶ 5–6.

¹⁵⁰ *Id.* ¶ 5.

¹⁵¹ *Id.* ¶¶ 6–7.

¹⁵² Stillman, *supra* note 123.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ S. Poverty Law Ctr., *SPLC lawsuit closes debtors’ prison in Alabama capital* (Aug. 25, 2014), <http://www.splcenter.org/get-informed/news/splc-lawsuit-closes-debtors-prison-in-alabama-capital>, archived at <https://perma.cc/FDE8-J6U6>. Ultimately, the city settled. Settlement, *Mitchell v. Montgomery*, No. 2:14-cv-186 (M.D. Ala. Nov. 17, 2014).

¹⁶⁰ For more on Georgia’s for-profit probation industry, see Bellacicco, *supra* note 145, at 234.

¹⁶¹ Pishko, *infra* note 177.

prison sentence and serves to keep people in their communities instead of incarcerated. Rather, pay-only probationers are people too poor to pay fines or fees, yet who pose no public safety risk and do not require court supervision.¹⁶² This form of probation is purely a debt collection service and is frequently outsourced to private, for-profit companies. Like ordinary probation, this form of supervision exerts considerable control over the lives of its probationers. Probation companies set the monthly amount that a person must pay, mandate regular appointments that a probationer must attend, and have the authority to revoke probation for nonpayment and send people to jail.¹⁶³

Municipalities pay little (if anything at all) in exchange for these collection services because additional fees and profits are retained by the company and are frequently not capped.¹⁶⁴ Freedom Probation Services, for example, offers its services to cities for free; with an exclusive contract for collection¹⁶⁵ and an essentially unregulated ability to charge and retain additional collection fees,¹⁶⁶ it reaps enormous profits. Similarly, Judicial Corrections Services, Inc., doubled its \$6.5 million in revenue from 2006 to 2009, when it earned \$13.6 million.¹⁶⁷ With such financial incentives, these probation companies rely heavily on the threat of revocation—jail time—to coerce probationers into paying. This coercion can be extreme, as in the case of Red Hills Community Probation, which allegedly prevented people from leaving the courthouse until they had paid their fines and threatened to jail people who had already satisfied their debts.¹⁶⁸ Nonpayment or partial payment can even be more lucrative than full payment, as pay-only probationers who fail to make scheduled payments can remain in probation longer, accruing more monthly fees.¹⁶⁹ The poorer the pay-only probationer, then, the more she must ultimately pay.

Some of these companies' most lucrative services involve not just collecting outstanding fines but ongoing electronic monitoring, such as ankle bracelets. Tom Barrett discovered this firsthand. Barrett, an unemployed, recently homeless veteran subsisting on food stamps, stole a single \$2 can of

¹⁶² HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 25 (2014), available at http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf, archived at <http://perma.cc/2EC2-YY2W>.

¹⁶³ See, e.g., Carrie Teegardin, *Georgia Probation Systems Ensnare Those Too Poor to Pay Traffic Fines*, S. CTR. FOR HUMAN RIGHTS (Nov. 24, 2014), https://www.schr.org/resources/georgia_probation_systems_ensnare_those_too_poor_to_pay_traffic_fines, archived at <https://perma.cc/34JE-FBHL>.

¹⁶⁴ HUMAN RIGHTS WATCH, *supra* note 162, at 27.

¹⁶⁵ Stillman, *supra* note 123.

¹⁶⁶ HUMAN RIGHTS WATCH, *supra* note 162, at 64–65.

¹⁶⁷ *Judicial Correction Services, Inc. 5000*, <http://www.inc.com/profile/judicial-correction-services>, archived at <https://perma.cc/Q9ZW-YT2Q> (last visited Oct. 26, 2015).

¹⁶⁸ Aviva Shen, *Private Company Conspired With Police To Hold Poor People For Ransom, Lawsuit Charges*, THINKPROGRESS (Apr. 15, 2015), <http://thinkprogress.org/justice/2015/04/15/3647374/private-probation-lawsuit-ransom/>, archived at <https://perma.cc/H9R3-3REG>.

¹⁶⁹ HUMAN RIGHTS WATCH, *supra* note 162, at 27.

beer from a convenience store.¹⁷⁰ He was sentenced to a \$200 fine and twelve months of pay-only probation on the condition that he be electronically monitored by Sentinel Offender Services, a for-profit probation company.¹⁷¹ Sentinel charged \$12 per day for the device, a \$50 setup fee, a \$39 monthly monitoring fee, and a \$400 installation charge for a landline required for the system to work.¹⁷² Barrett spent more than a month in jail because he could not afford an \$80 “startup” fee, which was eventually paid by his Alcoholics Anonymous sponsor.¹⁷³ His fees added up to \$360 per month, and ultimately totaled more than \$1,000.¹⁷⁴ His only income was from donating plasma, which he used to pay rent on his subsidized apartment.¹⁷⁵ Unable to satisfy Sentinel, his probation was revoked and Barrett went back to jail.¹⁷⁶

While they exist chiefly in the South,¹⁷⁷ for-profit probation companies operate in Utah, Missouri, Montana, and Colorado as well.¹⁷⁸ The profit motives of these companies should have no place in a criminal justice system—particularly a system that repeatedly violates constitutional protections.

PART III: CONSTITUTIONAL LIMITS ON FINES AND FEES

As anyone who has received a traffic ticket knows, court appearances for a misdemeanor or minor offense may look more like a visit to the DMV than an episode of *Law & Order*. Some places, like Alabama and Louisiana, involve a full criminal court hearing before a judge.¹⁷⁹ Other areas are much more informal, with a lawyer (or sometimes, even a non-lawyer), often termed an administrative law judge or hearing officer, adjudicating the claim.¹⁸⁰ A docket may not be created, a transcript is unlikely to be taken,

¹⁷⁰ Lucky Severson, *Probation for Profit*, RELIGION & ETHICS NEWSWEEKLY, PBS (Aug. 29, 2014), <http://www.pbs.org/wnet/religionandethics/2014/08/29/august-29-2014-probation-profit/23971/>, archived at <http://perma.cc/4FY9-FRWX>.

¹⁷¹ *Id.*

¹⁷² Shapiro, *supra* note 42.

¹⁷³ HUMAN RIGHTS WATCH, *supra* note 162, at 34.

¹⁷⁴ Nicole Flatow, *How Private Companies Are Profiting From Threats To Jail The Poor*, THINKPROGRESS (Feb. 6, 2014), <http://thinkprogress.org/justice/2014/02/06/3259851/private-probation-firms-leverage-jail-threats-profit-poor/>, archived at <http://perma.cc/2C7P-R7N5>.

¹⁷⁵ HUMAN RIGHTS WATCH, *supra* note 162, at 35.

¹⁷⁶ *Id.*

¹⁷⁷ Jessica Pishko, *Locked Up for Being Poor*, THE ATLANTIC (Feb. 25, 2015), <http://www.theatlantic.com/national/archive/2015/02/locked-up-for-being-poor/386069/>, archived at <https://perma.cc/AS7Q-YB7F>.

¹⁷⁸ Stillman, *supra* note 123, at 4.

¹⁷⁹ In Alabama and Louisiana, traffic offenses are criminal offenses warranting criminal procedures. ALA. CODE § 32-1-4 (1975) (classifying all motor vehicle violations as criminal misdemeanors); LA. STAT. ANN. § 32:57(A) (classifying violations with penal sanctions not listed as misdemeanors); LA. CODE CRIM. PROC. ANN. art. 933(4) (same).

¹⁸⁰ See, e.g., *What to Expect at a Hearing*, CITYOFCHICAGO.ORG, http://www.cityofchicago.org/city/en/depts/ah/supp_info/the_hearing_process/what_to_expect_athearing.html archived at <http://perma.cc/EW3Z-XGVQ> (last visited Oct. 26, 2015) (describing process in Chicago); Traffic Violations Bureau, *What To Do If You Receive A Traffic Ticket*, N.Y. STATE

and few, if any, judicial records exist of the events that take place.¹⁸¹ As a result, these practices have largely gone unreviewed by state courts, and have only emerged into public scrutiny through investigative journalism, community-based litigation, and government investigations.

A close look reveals that many of the practices described *supra* amount to blatant constitutional violations. Defendants in these cases are denied adequate notice of the charges or a meaningful attempt to challenge them, in violation of their due process rights. Courts then fail to conduct the applicable legal analysis (assessing the indigency of the defendant) before imposing fines, or conduct an improper one, in violation of the Equal Protection Clause.

A. Fourteenth Amendment Framework

The Due Process and Equal Protection Clauses of the Fourteenth Amendment shield poor defendants from being incarcerated merely because they are too poor to pay court-imposed monetary sanctions. As fines and fees became more prevalent in the 1970s, the Supreme Court found itself examining several situations dangerously similar to the debtors' prisons of the past. Fines, fees, work camps, parole conditions: all became, in a sense, new types of prisons for the poor and the poor alone. While a wealthy defendant could easily pay a fine and walk away from the criminal justice system, poor defendants found themselves in lengthy (and sometimes indefinite) jail terms, unable to extricate themselves from a system trying to squeeze blood from turnips.

The first case to reach the Supreme Court was *Williams v. Illinois*.¹⁸² Willie Williams had been convicted of petty theft and sentenced to a year of imprisonment plus a \$500 fine and \$5 in court costs.¹⁸³ By law, if Williams did not pay the fine by the end of his period of imprisonment, he would remain imprisoned until his fine had been "worked off" at a rate of \$5 per day.¹⁸⁴ Because Williams was unable to pay, the law in effect meant Williams would be imprisoned for a total of 101 days beyond his original sentence.¹⁸⁵ The Court found that the Illinois statute at issue, though neutral on its face, worked an "invidious discrimination" upon Williams as a poor person.¹⁸⁶ It held that imprisoning a defendant beyond the statutory maximum

DEPT OF MOTOR VEHICLES, <http://dmv.ny.gov/brochure/traffic-violations-bureau>, archived at <http://perma.cc/W2QZ-QW76> (last visited Oct. 26, 2015) (describing process in New York City and Rochester).

¹⁸¹ Balko, *supra* note 131 ("I've asked prosecutors for a client's file and they've flat turned me down [. . .] They'll say 'Here's a list of his warrants, but we can't show them to you. Just trust us.' Or they'll just staple a blank form to a manila envelope, write my client's name on it, and call that his 'file.'").

¹⁸² 399 U.S. 235 (1970).

¹⁸³ *Id.* at 236.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 236–37.

¹⁸⁶ *Id.* at 242.

sentence for his crime because of an inability to pay court fines was a violation of the Equal Protection Clause: “[T]he State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.”¹⁸⁷ The Court rejected the State’s argument that forcing the poor to serve additional time was a “rational means” of implementing a policy to collect revenue,¹⁸⁸ and noted that numerous, non-discriminatory alternatives proposed by the appellant could further the same objective.¹⁸⁹

The next year, the Court extended this rationale to fines-only penalties. Preston Tate had accumulated nine different traffic offenses, which carried with them fines and fees of \$425.¹⁹⁰ Unable to pay the legal debt, Tate was sentenced to a prison farm to “work off” his fines at a rate of \$5 per day, resulting in a total sentence of 85 days.¹⁹¹ The Court held that “[a]lthough the instant case involves offenses punishable by fines only, petitioner’s imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like *Williams*, petitioner was subjected to imprisonment solely because of his indigency.”¹⁹² Courts, thus, may not convert fines into incarceration due to an inability to pay.¹⁹³

Justice Harlan’s concurrence in *Williams v. Illinois*,¹⁹⁴ arguing that Due Process and “fundamental fairness” rather than Equal Protection applied, foreshadowed the ultimate fate of the doctrine twelve years later. The seminal case against modern debtors’ prisons is *Bearden v. Georgia*.¹⁹⁵ Danny Bearden had been sentenced to three years of probation and ordered to pay \$750 in fines and restitution.¹⁹⁶ He made payments at first, but lost his job and was unable to continue paying.¹⁹⁷ As a result, the court revoked his probation and sentenced him to two years in prison.¹⁹⁸ The Court held that both the Equal Protection Clause and the Due Process Clause were implicated by Danny Bearden’s situation.¹⁹⁹ It explained that the Due Process and Equal Protection analyses were “intertwined”: “[W]e generally analyze the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 238 (seeming to adopt rational basis review).

¹⁸⁹ *Id.* at 244.

¹⁹⁰ *Tate v. Short*, 401 U.S. 395, 396 (1971).

¹⁹¹ *Id.* at 396–97.

¹⁹² *Id.* at 397–98.

¹⁹³ *Id.* at 398–99.

¹⁹⁴ *Id.* at 259 (Harlan, J., concurring) (“The ‘equal protection’ analysis of the Court is, I submit, a ‘wolf in sheep’s clothing,’ for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of ‘fundamental fairness.’ . . . I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this appellant.”).

¹⁹⁵ 461 U.S. 660 (1983).

¹⁹⁶ *Id.* at 662.

¹⁹⁷ *Id.* at 662–63.

¹⁹⁸ *Id.* at 663.

¹⁹⁹ *Id.* at 665.

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.”²⁰⁰ On the one hand, *Bearden* was being treated differently from defendants who were not poor, and thus could escape the threat of jail time altogether, implicating the Equal Protection Clause; on the other hand, the court did not appropriately evaluate his financial situation before imposing a sentence, in violation of *Bearden*’s due process rights. *Bearden* established that sentencing courts must inquire into a defendant’s reasons for not paying a fine or fee before sentencing him to jail time. Failure to do so punished the poor merely for being poor.²⁰¹ A defendant faced with the prospect of jail for nonpayment of a fine may be jailed only if she willfully refuses to pay the fines or fees.²⁰² If she merely cannot afford it, jailing her amounts to a constitutional violation.²⁰³

These cases do not represent cutting-edge Supreme Court doctrine—they have been well-established for thirty years. It is perhaps no surprise, then, that numerous lawsuits to date are still pending, have settled, or been voluntarily dismissed following reform.²⁰⁴ There is little question that many municipalities are violating *Bearden* and the constitutional rights it is meant to protect.

B. Current Due Process and Equal Protection Violations

Despite these constitutional protections, municipalities have rampantly infringed on the *Bearden* rights of defendants. In fact, the modern trend of due process and equal protection violations goes beyond the abuses Danny *Bearden*, Willie Williams, or Preston Tate experienced. Today, courts are denying other due process protections implicated but not directly at issue in *Bearden*, such as procedural due process rights to notice and a fair hearing. In violation of these rights, ticketing authorities neglect to adequately inform or notify residents of their citations and fail to provide a meaningful opportunity to contest the charges. Even when a defendant is notified and a hearing takes place, judges often fail to conduct an indigency analysis at all, or they consider improper, arbitrary, and irregularly applied factors to determine whether someone is willfully refusing to pay. Correspondingly, poor

²⁰⁰ *Id.*

²⁰¹ *Id.* at 672–73.

²⁰² *Id.* at 668–72.

²⁰³ *Id.* at 672–73.

²⁰⁴ See, e.g., Settlement, Mitchell v. Montgomery, No. 2:14-cv-186 (M.D. Ala. Nov. 17, 2014); Memorandum Opinion, Ray v. Judicial Corr. Servs., No. 2:12-cv-02819 (N.D. Ala. Sept. 26, 2013) (surviving motion to dismiss); Settlement Agreement, Thompson v. DeKalb Cty., No. 1:15-cv-280 (N.D. Ga. Mar. 18, 2015); Joshua Norman, *Group Dismisses Lawsuit*, SUN HERALD (Feb. 1, 2007), <https://www.schr.org/node/111>, archived at <http://perma.cc/JCA2-ZBRW> (voluntarily dismissing following reform).

residents are treated differently than others in violation of the Equal Protection Clause, subject to jail time and additional fines or fees that non-indigent residents would never face. These practices persist in part because the original violations do not impose prison terms, and so defendants are not entitled to attorneys and are largely unaware that their rights are being violated.²⁰⁵

As a matter of procedural due process, individuals are entitled to fair notice of criminal charges²⁰⁶ and an opportunity to be heard to contest those charges.²⁰⁷ Yet municipalities in Alabama and Missouri contravened due process protections by failing to adequately notify individuals of claims against them or permit them a reasonable opportunity to dispute those charges, and citations in Ferguson, Missouri, lacked critical information, such as the charge, whether a court appearance was required, or the vehicle's speed on speeding tickets.²⁰⁸ Many Ferguson citations included incorrect court appearance dates and times.²⁰⁹ Missed payments or appearance notifications that resulted in arrest warrants were not sent by certified mail or phone call, but by postcard, until the postcard notices were eliminated altogether.²¹⁰ There was also a poorly publicized process by which defendants could clear warrants by appearing at a police window and paying bond.²¹¹ These deficient citations, postcards, and practically invisible procedures failed to give adequate due process notice to defendants of both the very fact that the State had filed charges against them and the particular nature of those charges.

Similarly, defendants were denied a fair opportunity to be heard and contest the State's allegations. Debtors in Cool Valley, Missouri, often had no idea that their warrants could be cleared with an attorney, while attorneys said they were given the runaround with blank files and refusals to disclose any actual evidence or witnesses supporting the charge.²¹² Without this information, defendants and their attorneys could not meaningfully defend against the charges, denying them constitutional due process protections. In addition, prosecutors and judges in Ferguson unlawfully retaliated against defendants for attempting to invoke their constitutional rights. One prosecutor said, "If the attorney goes off on all of the constitutional stuff, then I tell

²⁰⁵ The Sixth Amendment right to counsel applies when a defendant is formally charged of a crime that leads to actual imprisonment. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979). When a defendant faces only a fine or fee without imprisonment, the Sixth Amendment right to counsel does not attach, but for many of the practices described *supra*, imprisonment is the de facto punishment for nonpayment of the fine or fee. As a result, one could argue that defendants are facing a suspended sentence, and should thus be entitled to counsel at the initial sentencing in accordance with *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

²⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–72, (1951) (Frankfurter, J., concurring)).

²⁰⁷ *Id.* at 333.

²⁰⁸ DOJ FERGUSON REPORT at 45.

²⁰⁹ *Id.* at 46.

²¹⁰ *Id.* at 47.

²¹¹ *Id.*

²¹² Balko, *supra* note 131.

the attorney to come . . . and argue in front [of] the judge—after that, his client can pay the ticket.”²¹³ A judge also threatened a defense lawyer who objected to repeated interruptions of his cross-examination with “I will hold you in contempt and I will incarcerate you.”²¹⁴ Judges further withheld the names of witnesses and refused to allow cross-examination.²¹⁵ These amount to blatant due process violations, as invoking constitutional protections and cross-examining witnesses are fundamental rights of the accused that cannot be ignored or punished.²¹⁶

More frequently, however, courts violated due process by failing to conduct an indigency analysis before incarcerating individuals for nonpayment of imposed fines and fees. As established in *Bearden*, courts must assess a defendant’s ability to pay before sentencing her to jail time. Yet in Ohio, no indigency hearings took place at all.²¹⁷ In Alabama, court appearances lasted only a few minutes, without counsel, a court reporter, or any inquiry into the defendant’s ability to pay.²¹⁸ In Missouri, those unable to afford bond were incarcerated for up to 72 hours²¹⁹ and courts routinely issued arrest warrants for failure to pay fines.²²⁰ These practices directly contravened *Bearden*, which requires an inquiry into the defendant’s ability to pay and suggests that municipalities consider alternatives to incarceration, such as fine reduction or public service.²²¹ Because only those too poor to post bail or pay their fines immediately faced the threat of jail time, such practices also violated defendants’ equal protection rights as poor people. The DOJ similarly concluded that those practices raised “significant due process and equal protection concerns.”²²²

Where indigency analyses did take place, they were often inadequate or improper. There exist no constitutional or legal guidelines, for *how* judges should determine indigence,²²³ and so judges generally have broad discretion to determine the baseline for indigency. Many based their evaluations on

²¹³ DOJ FERGUSON REPORT at 44.

²¹⁴ *Id.*

²¹⁵ *Pointer v. Texas*, 380 U.S. 400, 402 (1965).

²¹⁶ *Id.* at 404.

²¹⁷ AM. CIVIL LIBERTIES UNION OF OHIO, *THE OUTSKIRTS OF HOPE: HOW OHIO’S DEBTORS’ PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES* 6 (2013), available at http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf, archived at <https://perma.cc/BG2B-EG76>.

²¹⁸ Stillman, *supra* note 123.

²¹⁹ DOJ FERGUSON REPORT at 60.

²²⁰ *Id.*

²²¹ *Id.* at 57–58 (“Ferguson’s practice of automatically treating a missed payment as a failure to appear—thus triggering an arrest warrant and possible incarceration—is directly at odds with well-established law that prohibits ‘punishing a person for his poverty.’”)

²²² *Id.* at 55.

²²³ Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 572 (2005) (“While it is axiomatic that the poor are entitled to a free lawyer, there is virtually no legal authority or scholarly commentary specifying how poor a defendant must be to qualify as indigent.”).

arbitrary or inappropriate factors. One Washington judge told a reporter that he evaluated his defendants' physical presentation and clothing:

"They come in wearing expensive jackets," he says referring to defendants who wear NFL football team jackets, "or maybe a thousand dollars' worth of tattoos on their arms. And they say, 'I'm just living on handouts.'" If the jacket or tattoos were a gift, he tells the defendants they should have asked the giver for the cash to pay their court fees instead.²²⁴

Other judges asked whether the defendant owned a cell phone or smoked cigarettes, and used their responses as the sole indicators of poverty.²²⁵ Another judge explained that he would not review an indigence application if the defendant posted bond.²²⁶ Judges also told defendants to pay fines using their Temporary Assistance for Needy Families funds, disability payments, veterans' benefits, or payments for other public assistance programs.²²⁷ They even encouraged defendants to coax money out of relatives, friends, employers, or acquaintances.²²⁸ These are improper indicators of indigency that reflect subjective assumptions, rather than objective need. The sentencing court in *Bearden* had commented on the availability of odd jobs, but this was not sufficient to deny *Bearden's* indigence.²²⁹ As such, arbitrary markers of poverty, particularly when used alone and without examining other factors, do not satisfy the constitutional requirements of *Bearden*.

The constitutional protections at issue are so clear, and the violations so blatant, that legal challenges are swiftly upheld. Yet defendants rarely know their *Bearden* rights and lack the resources to challenge violations. Legal precedent alone has not yet been enough to curb these abuses, and the consequences are devastating.

²²⁴ Joseph Shapiro, *Supreme Court Ruling Not Enough To Prevent Debtors Prisons*, NPR (May 21, 2014), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> (quoting Judge Robert Swisher, a Superior Court judge in Benton County).

²²⁵ Flatow, *supra* note 174; Shapiro, *supra* note 224.

²²⁶ Shailla Dewan, *Driver's License Suspensions Create Cycle of Debt*, N.Y. TIMES (Apr. 14, 2015), <http://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html>.

²²⁷ Shapiro, *supra* note 224.

²²⁸ See generally MITALI NAGRECHA & MARY FAINSOD KATZENSTEIN, CTR. FOR COMMUNITY ALTERNATIVES, *WHEN ALL ELSE FAILS, FINING THE FAMILY* 19 (2015); Joseph Shapiro, *Study Finds Court Fees Also Punish The Families Of Those Who Owe*, NPR (Jan. 29, 2015), <http://www.npr.org/blogs/thetwo-way/2015/01/29/382380183/study-finds-court-fees-also-punish-the-families-of-those-who-owe>.

²²⁹ *Bearden*, 461 U.S. at 673.

PART IV: THE CONSEQUENCES OF LEGAL DEBT

Much has been written about the collateral consequences of criminal convictions.²³⁰ But legal debt in and of itself brings a torrent of similar but independent collateral consequences, with their own disastrous costs. One study refers to legal debt's contribution to the "accumulation of disadvantage,"²³¹ or the reproduction, reinforcement, and perpetuation of inequality. Poor people faced with enormous fines and fees as a result of petty violations and misdemeanors face the same effects as those with consumer credit debt—poor credit, feelings of shame and emotional distress, and an increased risk of losing transportation, housing, work, and good health—coupled with the added burden of state action, such as license suspension, loss of community services and government benefits, and, in some cases, disenfranchisement. "[L]egal debt is particularly injurious: unlike consumer debt, it is not offset by the acquisition of goods or property, is not subject to relief through bankruptcy proceedings, and may trigger an arrest warrant, arrest, or incarceration."²³² Arrest warrants are particularly harmful because they are public information. When an unpaid debt or missed court appearance become a warrant, a minor traffic ticket can suddenly include the same collateral consequences as a felony conviction, making it difficult for debtors to find or keep a job, home, or educational license, or participate in mainstream markets and economies.²³³

LFOs also have less tangible, but no less powerful, effects on feelings of self-worth, self-respect, and self-determination. These feelings fuel resentment both *toward* law enforcement, because residents feel targeted and victimized, and *from* law enforcement, who feel so much pressure to bring in revenue and aggressively over-enforce low-level violations that they cross the line into unconstitutional police practices. Together, these forces lead to the deterioration of community trust that not only harms residents and citizens, but also impedes law enforcement objectives.

A. *Economic Effects*

Economic sanctions unsurprisingly have significant economic consequences. Most obviously, debt represents money owed that cannot be spent elsewhere: on food, clothing, housing, childcare, transportation, essentials, or consumer goods, creating significant financial stress.²³⁴ It is money captured from the greater economy, and a burden even for those not struggling

²³⁰ See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

²³¹ Harris, *supra* note 36, at 1756.

²³² *Id.* at 1763.

²³³ Balko, *supra* note 131.

²³⁴ See Harris, *supra* note 36, at 1777 (discussing the effect of debt on felons with outstanding LFOs).

to get by. But for the poor—the people who are already unable to regularly make ends meet—legal debt becomes a crushing hardship in nearly every corner of daily life. The consequences of fines and fees can be dramatic and unforgiving: unemployment, loss of transportation, homelessness, loss of government or community services, and poor credit. And without the ability to accumulate wealth or capture even the smallest windfall for themselves, the poor become poorer, unable to climb out of an economic chasm.

When someone must repeatedly report for in-person court appearances, spend time under arrest or in jail for nonpayment of fines, and live with outstanding warrants for her arrest, she is unlikely to be able to maintain her current job or find another. Inability to find work likely means inability to pay the fines and, in many cases, to satisfy the conditions of parole. Jack Dawley, in Ohio, described a cycle of incarceration due to his inability to pay fines:

It was pretty much a vicious cycle. . . . You'd go do your ten days, and they'd set you up a court date and give you another 90 days to pay or go back to jail[.] . . . It was hard for me to obtain work, so I fell back into the cycle of going to jail every three months.²³⁵

He did odd construction jobs, but an injury left him seeking less physically demanding work.²³⁶ When he finally secured a job as a cashier, only three weeks later he was pulled over and arrested for his outstanding fines.²³⁷ With no means to pay, he spent ten days in jail—and came out without a job, again.²³⁸ Substantial legal debt also disincentivizes work.²³⁹ Kenneath Seay lost *four* jobs because of his unpaid fines, because he was repeatedly jailed and unable to turn up for work.²⁴⁰ His license was suspended as a result of the fines, and he ultimately gave up on driving altogether because he could not pay the debt.²⁴¹ Allison Nelson, a Missouri woman, expressed frustration that she could not join the Navy until she sorted out her driving record and outstanding warrants.²⁴² With legitimate work difficult to find, LFOs may drive debtors toward underground, illegal, or dangerous work.²⁴³

The second consequence of carceral debt is usually loss of transportation. Allison Nelson explains the paradox: “You drive to work so you can pay the fines, but then you get pulled over, so you owe even more.”²⁴⁴ Many

²³⁵ AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 217, at 11.

²³⁶ *Id.*

²³⁷ *Id.* at 11–12.

²³⁸ *Id.* at 12.

²³⁹ Harris, *supra* note 36, at 1781.

²⁴⁰ Dewan, *supra* note 230.

²⁴¹ *Id.*

²⁴² Davey, *supra* note 122.

²⁴³ See, e.g., BANNON ET AL., *supra* note 133, at 27 (“Wage and tax garnishment, for example, discourages individuals from participating in legitimate employment and pushes them toward the underground economy.”).

²⁴⁴ Davey, *supra* note 122.

jurisdictions suspend or revoke licenses for nonpayment of fines,²⁴⁵ creating a Catch-22 in which people who live without meaningful public transportation options cannot legally get to work without continuing to violate the law and amass more debt.²⁴⁶ California suspended—and never reinstated—the licenses of 4.2 million residents who had failed to pay court debt between 2006 and 2013.²⁴⁷ The result is a system that punishes debtors more than reckless drivers. In Wisconsin, a citation for drinking and driving results in a nine-month license suspension, while a hit-and-run results in a year-long suspension.²⁴⁸ But failure to pay an ordinary traffic ticket, such as for a broken taillight, can result in a two-year suspension.²⁴⁹ Using license suspensions as punishment for non-driving-related offenses is “less effective in keeping dangerous drivers off the road, which was the original intent of driver license suspensions.”²⁵⁰ In fact, license suspensions that are not required for public safety reasons can “do more harm than good” because a license in many areas is “a means to survive.”²⁵¹ After having their licenses suspended, 42% of people in New Jersey lost their jobs, and of the 45% of those who were able to find new work, 88% accepted a job with a reduced salary.²⁵² Seay, who lost his license to unpaid fines, said, “If I could get my license back, that would be the most wonderful thing that happened to me in my life.”²⁵³

Without work or transportation to work, the next domino to fall is housing; LFOs increase the risk of foreclosure and homelessness. A woman in her 60s with a decades-old conviction for forging a prescription lost access

²⁴⁵ Joseph Shapiro, *Can't Pay Your Fines? Your License Could Be Taken*, NPR (Dec. 29, 2014), <http://www.npr.org/2014/12/29/372691960/cant-pay-your-fines-your-license-could-be-taken>. The author of a 2013 study from the American Association of Motor Vehicle Administrators “found that at least 18 states will suspend someone’s driver’s license for failure to pay the fines on nondriving traffic violations. And four states will suspend it for not paying parking tickets. Among the other reasons: school truancy, bouncing a check, not paying college loans, graffiti and littering.” *Id.*

²⁴⁶ AM. ASS’N OF MOTOR VEHICLE ADM’RS, BEST PRACTICES GUIDE TO REDUCING SUSPENDED DRIVERS 6 (2013) [hereinafter AAMVA Guide to Reducing Suspended Drivers] (“Drivers who have been suspended for social non-conformance related offenses are often trapped within the system. Some cannot afford to pay the original fines, and may lose their ability to legally get to and from work as a result of the suspension. Many make the decision to drive while suspended. The suspension results in increased financial obligations through new requirements such as reinstatement fees, court costs and other penalties.”).

²⁴⁷ LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 9 (Mar. 2015), available at <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf>, archived at <https://perma.cc/GYE8-R3Y2>.

²⁴⁸ Joseph Shapiro, *How Driver’s License Suspensions Unfairly Target The Poor*, NPR (Jan. 5, 2015), <http://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor>.

²⁴⁹ *Id.*

²⁵⁰ AAMVA Guide to Reducing Suspended Drivers, *supra* note 246, at 5.

²⁵¹ *Id.* at 6.

²⁵² *Id.*

²⁵³ Dewan, *supra* note 240.

to subsidized housing for seniors because she had not paid off the accompanying \$500 fine.²⁵⁴ Those who may have built equity in their homes may lose them to foreclosure, as they become unable to keep up with mortgage payments. One woman, Harriet Cleveland, faced a cascade of setbacks thanks to her mounting fines; her utilities were shut off, she could not repair her home's foundation, and she nearly lost her home—and with it, her life savings—to foreclosure.²⁵⁵

Unemployed, homeless, and unable to care for their families, one might assume that the poor could turn to community and government services to get back on their feet. But poor people who depend on government programs to get by may find these benefits terminated as a result of their outstanding fines and fees. Temporary Assistance for Needy Families, for example, prohibits anyone in violation of a parole or probation condition or “fleeing” from a felony from receiving benefits.²⁵⁶ To make matters worse, if fine collection is outsourced to private companies, unpaid and outstanding tickets are sometimes reported to the major credit reporting bureaus and damage consumer credit.²⁵⁷ Damaged credit is devastating; it limits opportunities for work and housing and prevents debtors from opening bank accounts or from borrowing on favorable terms.²⁵⁸ Cumulatively, these disadvantages mean “you live your entire life under a cloud. In a very real sense, they [court debtors] drop out of the real society.”²⁵⁹

Legal debt hurts not only debtors themselves, but also their families. A study found that upon reentry, 92% of formerly incarcerated individuals surveyed accepted money from their family and 83% accepted food from family members.²⁶⁰ While the study was small and dealt with those convicted of and incarcerated for felonies, the same dynamic is at play when the poor face criminal debt. Terrica Seay, the wife of Kenneth Seay whose license suspension was discussed above, puts much of her income toward bail, probation, and her husband's backlog of fines.²⁶¹ “I'm just crying all day at

²⁵⁴ Shapiro, *supra* note 11.

²⁵⁵ Stillman, *supra* note 123.

²⁵⁶ 42 U.S.C. §§ 608 (a)(9)(A)(i)–(ii) (2012).

²⁵⁷ Ashley Hasley III, *Your credit may take a hit from unpaid traffic and parking tickets*, WASH. POST (Oct. 31, 2011), http://www.washingtonpost.com/local/commuting/your-credit-may-take-a-hit-from-unpaid-traffic-and-parking-tickets/2011/10/31/gIQABPVLZM_story.html, archived at <https://perma.cc/6RKQ-N2V7>.

²⁵⁸ The Fair Credit Reporting Act allows disclosure of credit to prospective employers, landlords, consumer lenders, and insurers, among others. 15 U.S.C. § 1681b (2014); *see also Ask Experian: Poor Credit Rating*, EXPERIAN.COM, <http://www.experian.com/credit-advice/topic-poor-credit-rating.html>, archived at <https://perma.cc/2KAQ-V6WM> (last visited Oct. 25, 2015).

²⁵⁹ Shapiro, *supra* note 11 (quoting Todd Clear, former Dean of the School of Criminal Justice and current Provost of Rutgers University-Newark).

²⁶⁰ NAGRECHA ET AL., *supra* note 228, at 19.

²⁶¹ Dewan, *supra* note 240.

work,” she said.²⁶² Tricia Metcalf of Ohio described the effect that her debt had on her children:

Money is extremely tight. . . . It affects us by basically not being able to do things that other kids get to do. Like going to a movie; I can’t often say to my kids “you can go see a movie.” We have to save money for a long time to have that little bit of extra. . . . We go without a lot of things.²⁶³

The instability of Metcalf cycling in and out of jail for nonpayment was so difficult for her son that she had him move in with her parents.²⁶⁴ When parents cannot afford food, shelter, or necessities, children may go hungry or become homeless. Children who rely on child support payments from parents with fines and fees may not receive it, as that money is instead captured by the municipality.

In all, LFOs further deplete the wealth and resources of already disadvantaged, poor, and mostly minority communities. The economic effects of criminal justice debt can be especially hard-felt by individuals and communities of color, particularly African Americans. Historical discrimination in employment,²⁶⁵ housing,²⁶⁶ education,²⁶⁷ political participation,²⁶⁸ and access to mainstream credit resources²⁶⁹ created much of the wealth gap that exists today between white families and families of color. In 2011, the median net worth of the typical white family was \$91,405, compared to only \$6,446 for African Americans and \$7,843 for Hispanics.²⁷⁰ African Americans are 2.8 times as likely to live in poverty as whites, and Hispanics are 2.6 times as likely.²⁷¹ Generational discrimination and the persistent wealth gap leaves black families in particular with “grossly fewer resources to draw on when they come under financial pressure” because they have been “already tapped out.”²⁷² Civil penalty schemes that exact serious financial burdens on

²⁶² *Id.*

²⁶³ AM. CIVIL LIBERTIES OF OHIO, *supra* note 217, at 13.

²⁶⁴ *Id.*

²⁶⁵ *See generally, e.g.*, RAYMOND F. GREGORY, *THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A FIFTY YEAR HISTORY* (2014).

²⁶⁶ *See generally, e.g.*, Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131 (2008).

²⁶⁷ *See generally, e.g.*, JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION* (2001).

²⁶⁸ *See generally, e.g.*, GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2013).

²⁶⁹ *See generally, e.g.*, BERYL SATTER, *FAMILY PROPERTIES* (2009); *see also* Nier, *supra* note 266.

²⁷⁰ PEW RES. CTR., *Race in America: Tracking 50 Years of Demographic Trends* (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/race-demographics>, archived at <https://perma.cc/9WMC-GG8K>.

²⁷¹ *Id.*

²⁷² Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>, archived at <https://perma.cc/7972-FAFC>.

the poor by correlation also exact their heaviest burdens on people of color and communities struggling with low incomes and savings.

B. Noneconomic Effects

Legal debt has noneconomic implications as well. Outstanding LFOs, like all debt, negatively affect health and health outcomes and can cause acute emotional distress. Debt causes feelings of guilt and shame, and the continual threat of incarceration for nonpayment fosters an atmosphere of helplessness and fear that are unique to this type of financial obligation. Also peculiar to legal debt, debtors may find themselves unable to vote. More subtly, the mass use of warrants, in which people are “wanted” by law enforcement, creates an atmosphere of fear that shapes human behavior.²⁷³ When police know where a person works or lives, what routes he or she takes to work or school, or what friends and family he or she visits, every mundane activity becomes fraught with danger.²⁷⁴

Lower socioeconomic status carries with it lower life expectancy and a greater chance of illness.²⁷⁵ One Ohioan described a particularly grisly consequence of legal financial obligations. Though he was initially able to keep up with his payments because of a steady job as a dishwasher, when the restaurant John Doe worked in suddenly closed, he found himself unemployed and without health insurance.²⁷⁶ Shortly thereafter he was diagnosed with diabetes, and faced mounting out-of-pocket expenses for his medication.²⁷⁷ His court payments fell by the wayside, and ultimately Mr. Doe was jailed—twice.²⁷⁸ Complications from diabetes and a lack of adequate medical treatment during his second stint in jail led to doctors amputating two of his toes.²⁷⁹

But health is not merely having all of one’s fingers and toes. Debt is also destructive to mental health, causing depression and anxiety.²⁸⁰ The condition of owing unpayable debts to the state, being harassed and hounded for bills, and in many cases, thrown in jail simply because one is poor, are conducive to feelings of shame, embarrassment, low self-worth, anxiety, fear, and sadness. Worse, the hopelessness of the debt can drive people to acts of desperation. Harriet Cleveland, the plaintiff in the Southern Poverty Law Center’s suit against Montgomery, Alabama, spoke of such desperation when the fees piled up. She began collecting soda cans for refund money,

²⁷³ Harris, *supra* note 36, at 1761–62.

²⁷⁴ *Id.* at 1761.

²⁷⁵ RICHARD G. WILKINSON & M. G. MARMOT, *SOCIAL DETERMINANTS OF HEALTH: THE SOLID FACTS 7* (2003).

²⁷⁶ AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 217, at 14.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ See John Gathergood, *Debt and Depression: Causal Links and Social Norm Effects*, 122 *ECON. J.* 1094, 1094 (2012).

rented out a room in her house to someone with dementia, and stuffed towels in the holes in her walls to keep out the cold because she could not afford repairs.²⁸¹ She collected scrap metal, took out a title loan on her car for 300% interest, and watched her house fall into foreclosure.²⁸² She even stole money from her son to pay the fees, for which she still feels guilt and shame.²⁸³ “He still ain’t forgiven me for that,” she said.²⁸⁴ Samantha Jenkins, a Missouri woman and plaintiff in the lawsuit against Ferguson and Jennings, said, “It made me feel sad, depressed, hopeless, helpless, like I can’t win for losing. . . . It’s like, how am I ever going to get my life back together when I got this keep holding, holding me back?”²⁸⁵

Those who are sent to jail face further humiliation and despair. Tricia Metcalf said that when she told the judge she was too poor to pay, he laughed at her: “It was one of the most humiliating things I’ve ever done in my life.”²⁸⁶ Kevin Thompson, the plaintiff in the ACLU’s lawsuit against DeKalb County, describes the emotional distress he felt in jail when he could not pay his fines:

All of a sudden, I realized that my mom was going to see me put in handcuffs and taken to jail. I could feel tears welling up in my eyes. I asked the judge if I could hug my mom. The judge said no. As I was handcuffed and taken to a cage behind the courtroom, I began to cry. I spent five days in the DeKalb County Jail where it was cold and dirty, and I didn’t get enough food. I felt ashamed, scared, and sad during those five days. It hurt to be separated from my family. And even after I was released, I felt scared that police might arrest me and jail me again for no good reason.²⁸⁷

Cleveland’s time in jail for nonpayment of fines was similarly bleak. “She slept on the floor, using old blankets to block the sewage from a leaking toilet.”²⁸⁸ She helped another woman give birth in jail to a stillborn baby because no medical help ever arrived.²⁸⁹ Nicole Bolden, a Missouri woman jailed for nonpayment of fines and fees, described her despair in jail:

²⁸¹ Stillman, *supra* note 123.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Joseph Shapiro, *Jail Time For Unpaid Court Fines And Fees Can Create Cycle of Poverty*, NPR (Feb. 9, 2015), <http://www.npr.org/blogs/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty>.

²⁸⁶ AM CIVIL LIBERTIES UNION OF OHIO, *supra* note 217, at 13–14.

²⁸⁷ Kevin Thompson, *For-Profit Companies Are Helping to Put People In Jail for Being Poor. I Should Know, I Was One of Them*, AM. CIVIL LIBERTIES UNION (Jan. 29, 2015), <https://www.aclu.org/blog/criminal-law-reform-racial-justice/profit-companies-are-helping-put-people-jail-being-poor-i-sh>, archived at <https://perma.cc/689X-C9YX>.

²⁸⁸ Stillman, *supra* note 123.

²⁸⁹ *Id.*

It's different inside those walls. . . . They treat you like you don't have any emotions. I know I have a heavy foot. I have kids. I have to work to support them. I've also been taking classes. So I'm late a lot. And when I'm late, I speed. But I'm still a human being.²⁹⁰

Bolden was so distraught at being in jail that she became suicidal and asked her kids not to visit her. "I didn't want them to see me like that I didn't want them to think it was normal, that it was okay for one of us to be in jail. I missed them so much. But I wasn't going to let them see me like that."²⁹¹ She described finally being hauled before a judge and wearing dirty clothes: "I was funky, I was sad, and I was mad I smelled bad. I was handcuffed. I missed my kids. I didn't feel like a person anymore."²⁹² She explained how *her* suffering was only part of the ordeal: "It doesn't just affect you. . . . It affects your family. Your kids. Your friends. My mother is disabled. And she had to help me out. My sister had to put her life on hold to watch my kids."²⁹³

People's interactions with private, for-profit collection companies also reflected resentment and anger. One Alabama man described paying JCS as "like paying protection to the Mafia."²⁹⁴ Another explained, "If you don't have seven hundred dollars, then the company makes you pay one thousand four hundred. . . . They're jacking it all up!"²⁹⁵

An unpaid fine or fee can even cause some people to lose the right to vote.²⁹⁶ Felons who have failed to pay fines, fees, restitution, and court costs in Alabama, Arizona, Arkansas, Connecticut, and Delaware cannot be re-enfranchised until their LFOs are paid.²⁹⁷ While municipal ordinance violations are not felonies, any violator who had a felony conviction and did not otherwise take steps to regain his or her right to vote may be required to pay subsequent misdemeanor or violation fees as a prerequisite to a successful re-enfranchisement application.²⁹⁸ This disproportionately affects African

²⁹⁰ Balko, *supra* note 131.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Stillman, *supra* note 123.

²⁹⁵ *Id.*

²⁹⁶ For an argument that requiring satisfaction of outstanding LFOs violates the Twenty-Third Amendment, see Jill E. Simmons, Note, *Beggars Can't Be Voters: Why Washington's Felon Re-Enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 316–22 (2003).

²⁹⁷ ESTELLE H. ROGERS, PROJECT VOTE, RESTORING VOTING RIGHTS FOR FORMER FELONS 8–10 (2014), available at <http://www.projectvote.org/wp-content/uploads/2014/03/POLICY-PAPER-FELON-RESTORATION-MARCH-2014.pdf>, archived at <https://perma.cc/SB4K-FQ2G>.

²⁹⁸ BANNON ET AL., *supra* note 133, at 29.

Americans, who are disenfranchised at a rate seven times the national average.²⁹⁹

C. *Perverse Incentives Lead to Unconstitutional Police Practices*

Perverse incentives created by revenue-focused law enforcement can lead to unconstitutional police practices that harm communities, particularly communities of color. The Department of Justice investigation into Ferguson, Missouri, revealed with great detail the extent to which police practices were shaped by the incentive system of a civil fine scheme. While we lack similar insights into other cities' practices and cannot say whether Ferguson is typical or extreme, it provides an excellent example of where an unrestrained and unregulated civil fine system can lead. In Ferguson, law enforcement's emphasis on revenue generation resulted in a "pattern and practice of constitutional violations"³⁰⁰ that adversely affected the community and its relationship to law enforcement—a relationship that will be difficult to repair in the years to come.

Pressured to write citations at all costs, officers did not wait to observe or investigate legitimate lawbreaking. Instead, they stopped citizens without reasonable suspicion, arrested citizens without probable cause, and used unreasonable force to subdue citizens.³⁰¹ Police officers must have a reasonable, articulable suspicion that criminal activity is afoot to detain someone.³⁰² Because police often did not have a legitimate reason to detain or arrest individuals, the city implemented a "Failure to Comply" ordinance³⁰³ that the DOJ described as both "facially unconstitutional in part" and "frequently abused in practice."³⁰⁴ Failure to Comply, as a vague and overbroad offense, allowed the police to detain and arrest individuals simply for refusing to stop engaging in lawful activity.³⁰⁵ As applied, the police cited it to arrest a minor for refusing to stay in his home and a man who refused to answer their questions.³⁰⁶

Officers also circumvented the Fourth Amendment warrant requirement by self-generating and circulating in a state database an informal "wanted" list, consisting mainly of suspects for whom the police did not have probable cause and thus could not have secured a warrant for their arrests.³⁰⁷ Knowing that three-quarters of Ferguson residents had an outstanding warrant, police ignored the reasonable suspicion requirement to run as many

²⁹⁹ Erika L. Wood & Neema Trivedi, *Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 30, 32 (2007).

³⁰⁰ DOJ FERGUSON REPORT at 15.

³⁰¹ *Id.*

³⁰² *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

³⁰³ FERGUSON MUN. CODE § 29-16 (2013).

³⁰⁴ DOJ FERGUSON REPORT at 16.

³⁰⁵ *Id.* at 19.

³⁰⁶ *Id.* at 19, 21.

³⁰⁷ *Id.* at 22–24.

identifications as possible through the warrant system to identify “offenders,” arrest them, and levy additional fines.³⁰⁸ For example, police stopped one man waiting at a bus stop, arrested another who they knew was not the intended suspect, and fabricated reports of traffic violations for a third.³⁰⁹

Yet the violations did not stop at the Fourth Amendment. The Ferguson Police Department also violated citizens’ First Amendment rights, preventing individuals from recording or otherwise observing police activities.³¹⁰ They also stopped, arrested, and harassed citizens based on speech and expression protected by the First Amendment, including using profanity and reporting police conduct to 911.³¹¹ Citizens who asked the reason for the stop, attempted to record the stop, or were simply present during the stop of another, were arrested though no legal basis existed for such arrests.³¹²

Further, these police practices disproportionately targeted and, in many cases, intentionally discriminated against African Americans.³¹³ Though African Americans comprised only 67% of the Ferguson population, they accounted for 85% of vehicle stops, 90% of citations, and 93% of arrests.³¹⁴ Despite being less likely to have contraband than white detainees, African Americans were searched more, ticketed more, and arrested more when the grounds for arrest were solely nonpayment of fines and fees.³¹⁵ This was also true in DeKalb County, Georgia, where nearly all those arrested for nonpayment were African Americans despite African Americans comprising only half the population.³¹⁶

When citizens feel targeted by their own government for petty offenses; are financially indebted by that over-policing; suffer collateral consequences such as homelessness, loss of work, disenfranchisement, and feelings of shame; and are subject to unconstitutional police practices in their neighborhoods, community trust between citizenry and its government and law enforcement suffers. Legal debt undermines the criminal justice system by creating a two-tiered system in which poor people receive a different form of justice than those with means.³¹⁷ Municipal fine debt is also a racial justice issue, as policing practices disproportionately target minority neighborhoods, where residents may already struggle with issues of trust with law enforcement.

³⁰⁸ *Id.* at 17–18.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 24–28.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 4.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Gross, *supra* note 88.

³¹⁷ ERIC BALABAN & CARL TAKEI, DEBTORS’ PRISONS: PART I 11, available at <http://povertylaw.org/sites/default/files/files/webinars/criminaldebt/debtors-prisons-part-one.pdf>, archived at <https://perma.cc/P39B-PJY6> (last visited Feb 4, 2016).

In Ferguson, Missouri, the practices described *supra* led to residents feeling belittled, shamed, disbelieved, and disrespected.³¹⁸ Residents described fear—for themselves, their children, and their future in the community.³¹⁹ Casual intimidation by the police in routine interactions colored people’s perceptions of law enforcement, fostering mistrust and anger.³²⁰ Roelif Carter, a sixty-two-year-old Ferguson resident, said: “It’s the same old thing, just a different day. . . . It’s making me feel like you can’t trust them. There’s no way you could work off the anger.”³²¹ Unfair practices cause law enforcement to lose legitimacy in its community³²² and make residents less likely to contact the police or rely on them to resolve actual public safety concerns.³²³

Moreover, the criminal justice system loses legitimacy not just with residents, but with other actors in the system as well. One judge from Alabama, Stephen Wallace, described his court as “no different than a payday or a title-loan company, if our central purpose is collections.”³²⁴ “Welcome to a Third World Country,” an Alabama state judge, Tommy Nail, told a reporter, explaining that this system is “no longer in the best interest of the defendant, or society.”³²⁵

PART V: REFORMS, SOLUTIONS, AND ALTERNATIVES

Pay-or-stay systems are not only needlessly destructive to the poor, their families, and their communities, but they also simply make no sense. They are ineffective at deterring future violations and fiscally irresponsible insofar as incarcerating poor defendants is more costly to the state than simply waiving the fines. In 2010, states spent a total of \$48.5 billion per year on incarceration.³²⁶ The mean per capita expenditure for a state prisoner was \$28,323, or about \$78 per day, in 2010.³²⁷ The costs of incarceration range from \$40 to \$165 per day,³²⁸ plus the costs of issuing warrants, conducting hearings, and using collection agents and law enforcement to locate and arrest debtors.

³¹⁸ DOJ FERGUSON REPORT at 79.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ Davey, *supra* note 122.

³²² DOJ FERGUSON REPORT at 80.

³²³ *Id.* at 80–81.

³²⁴ Stillman, *supra* note 123.

³²⁵ *Id.*

³²⁶ BUREAU OF JUSTICE STATISTICS, STATE CORRECTIONS EXPENDITURES, FY 1982–2010 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>, archived at <https://perma.cc/UA7F-WP6F>.

³²⁷ A quarter of states spent \$40,175 or more per capita. See *id.* at 4.

³²⁸ HENRICHSON & DELANEY, *supra* note 40, at 10 fig.4 (dividing the average annual cost per prisoner by 365 days in the least expensive state, Kentucky, and the most expensive state, New York).

For example, Clifford Hayes, a homeless man seeking clearance to stay in a shelter, was jailed for an \$854 fine that had more than doubled to become over \$2,000 in the intervening years since the offense.³²⁹ Yet the cost to jail him for eight months was \$11,500.³³⁰ Similarly, Jared Thornburg, homeless and unemployed, was unable to pay his \$165 fine for making an illegal left turn.³³¹ His fees spiraled to \$306, and he was jailed for ten days at a cost of \$70 a day, or \$700—more than twice the total cost of his fines.³³²

Yet what alternatives exist, and how can we best curb abuses? First, many minor code infractions can be eliminated altogether. Remaining violations should make use of an escalation system that begins with a warning and allows people the chance to remedy violations. Second, law reform must bring areas currently operating outside of constitutional bounds within them and ensure that court systems are properly funded so that financial incentives never influence policing and incarceration policies. Third, courts can use their rulemaking powers to eliminate procedural defaults and use bench cards to educate judges and ensure that peoples' constitutional rights are being protected. Finally, I look to other countries for guidance on how they implement fair fines and fees to illustrate that our system is not the only way to operate financial sanctions.

A. Decriminalization, Warnings, and Waivers

Much of the conduct discussed *supra* in Part II should not be criminal in the first place. Communities are not made safer by criminalizing “manner of walking,” too-tall grass or weeds, failure to obey or comply, and, of course, failure to appear. There is no evidence that charging parents for absent children actually lowers truancy rates,³³³ and Texas has recently decriminalized truancy in part because of its ineffectiveness.³³⁴ Suspending drivers' licenses has little effect on behavior; those who need to get to work, school, or home, and who live in areas with inadequate public transportation,

³²⁹ Lauren Gambino, *Thrown in jail for being poor: the booming for-profit probation industry*, THE GUARDIAN (Mar. 2, 2014), <http://www.theguardian.com/money/2014/mar/02/poor-for-profit-probation-prison-georgia>, archived at <https://perma.cc/Y65F-SEHP>.

³³⁰ *Id.*

³³¹ Shapiro, *supra* note 11.

³³² *Id.*

³³³ Nadja Popovich, *Do US laws that punish parents for truancy keep their kids in school?*, THE GUARDIAN (June 23, 2014), <http://www.theguardian.com/education/2014/jun/23/sp-school-truancy-fines-jail-parents-punishment-children>, archived at <https://perma.cc/SP46-YQK8> (“[A]ccording to Joanna Heilbrunn, director of the National Center for School Engagement, and several other educational policy organizations who responded to the Guardian’s requests, there is no concrete data to back up the idea that fining and jailing parents helps fight truancy.”); see also Fuentes, *supra* note 48 (“Chronic absenteeism . . . is how poverty manifests itself on school achievement. It isn’t an argument for making truancy criminal.”).

³³⁴ *Texas decriminalizing students’ truancy*, ASSOCIATED PRESS (June 20, 2015), <http://www.usatoday.com/story/news/nation/2015/06/20/texas-truancy-absent-students-criminalized/29047285/>, archived at <https://perma.cc/APR9-FKT7>.

will rely on their cars anyway.³³⁵ The simplest remedy for excessive fines is simply to remove these “crimes” from the municipal code and leave people to live their imperfect lives. For example, legislators in Los Angeles have called for an end to serving tickets for jaywalking during the countdown clock, an offense that costs between \$190 and \$250 dollars per instance.³³⁶ As part of reforms in Ferguson, Failure to Appear can no longer be tacked on to a missed court appearance for minor traffic offenses.³³⁷

For low-level offenses that serve a public safety or criminal justice purpose, fines should rarely be the first recourse. Many of us who have experienced a traffic stop have also been given a warning or a chance to repair a broken taillight. The sensible response to this conduct is one of escalation, in which the severity of the response increases as noncompliance increases. Every offense should begin with a warning: renew your license, obtain car insurance, replace your headlight. If offenders are stopped again, give them a time period to remedy the violation before the fine goes into effect. Perhaps someone who cannot repair their car immediately may be able to do so in a month or 90 days. In fact, one of the authors of the original broken windows piece, George L. Kelling, has said that broken windows has been misused and misinterpreted to allow police to “overreact” and confuse broken windows as a tactic with zero tolerance as a solution: “Zero tolerance suggests you don’t warn, you immediately arrest. We don’t want police to just be making arrests. We want them to find solutions and at times that solution is simply deciding not to do anything, or saying, ‘You know you’re not supposed to be doing this, move along.’”³³⁸ Sometimes, not doing anything is the right thing for a police officer to do. However, because warnings are generally ad hoc and discretionary, an effective and fair fine enforcement scheme should codify a warning and escalation system.

Finally, for those who have extremely low incomes, courts should consider waivers or noneconomic alternatives, such as community service. While community service has attendant operating costs and difficulties for people without access to reliable transportation, it has been implemented successfully in at least one locale, Cambria County, Pennsylvania. There, indigent defendants who owe court-imposed fines or fees can participate in a

³³⁵ At least 75% of people who have had their licenses revoked keep driving. Shapiro, *supra* note 245.

³³⁶ Adrian Glick Kudler, *Los Angeles Might Finally Do Something About the Dumbest Jaywalking Tickets*, CURBED L.A. (May 5, 2015), http://la.curbed.com/archives/2015/05/los_an_geles_might_finally_do_something_about_the_dumbest_jaywalking_tickets.php, archived at <https://perma.cc/3GEU-3XQW>.

³³⁷ Jennifer S. Mann, *Muni court reform law takes effect Friday; many warrants, fines are being canceled early*, ST. LOUIS POST-DISPATCH (Aug. 23, 2015), http://www.stltoday.com/news/local/crime-and-courts/muni-court-reform-law-takes-effect-friday-many-warrants-fines/article_a790197b-b58b-548a-9616-934a36649358.html, archived at <https://perma.cc/463E-X8J9>.

³³⁸ Patt Morrison, *‘Broken windows’ policing isn’t broken, says criminologist George L. Kelling*, L.A. TIMES (Jan. 6, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-morrison-kelling-20150107-column.html#page=1>, archived at <https://perma.cc/J4BD-2PK6>.

pre-approved charity project, such as the Salvation Army or YMCA, or can request permission to be placed at locations of their choice, such as a church or daycare.³³⁹ This system is tailored to the individual needs of each defendant, allowing the flexibility to ensure completion of the program as well as a chance to contribute to their own communities and regain a sense of self-respect and dignity. There is simply no reason for a code violation to become overly punitive and oppressive by converting it into persistent debt or incarceration.

B. Law Reform

Successful civil rights lawsuits and legislative advocacy have secured a number of tangible reforms that can easily be adopted in other jurisdictions. First, codifying the protections of *Bearden* at a state or local level can serve as an effective reminder of the court's obligations to defendants. This can include making *Bearden*'s requirements explicit and known to relevant actors, mandating indigency hearings, or limiting the types of punishments that can be imposed. Second, in order to bring past abuses within constitutional bounds, municipalities can implement "amnesty" or "safe surrender" days, providing those with outstanding warrants a chance to clear their records and warrants for a reduced fine.

Many places have mandated formal indigency inquiries as part of routine court procedure before imposing certain fines or imprisonment. In Texas, unpaid truancy fines became an arrest warrant as soon as a student turned seventeen.³⁴⁰ An ACLU lawsuit forced Hidalgo County to change its policy so that truancy courts must determine whether a student was indigent and unable to pay a fine before allowing the fines to accrue and arrest warrants to issue.³⁴¹ In June 2014, Colorado Governor John Hickenlooper signed into law a bill banning the use of jail time for nonpayment of civil fines.³⁴² A 2010 lawsuit against practices in Harpersville, Alabama, led to Shelby County Circuit Judge Hub Harrington shutting down the municipal court system entirely after finding it was running a "debtors' prison" and "judicially sanctioned extortion racket" with constitutional violations so rampant and "numerous as to defy a detailed chronicling in this short space."³⁴³ Montgomery, Alabama, agreed to implement numerous reforms

³³⁹ See, e.g., BANNON ET AL., *supra* note 133, at 17.

³⁴⁰ Fuentes, *supra* note 48.

³⁴¹ *Id.* Note, however, that Texas recently decriminalized truancy, mooted this particular procedural protection. See ASSOCIATED PRESS, *supra* note 334.

³⁴² COLO. REV. STAT. ANN. § 18-1.3-702 (West 2015); *End Debtors' Prisons*, AM. CIVIL LIBERTIES UNION OF COLO., <http://aclu-co.org/campaigns/end-debtors-prisons/>, archived at <https://perma.cc/2Y3Z-4JHV> (last visited Oct. 18, 2015).

³⁴³ Debra Cassens Weiss, *Court and Probation Company Are Running 'Extortion Racket,' Alabama Judge Says*, ABA J. (July 16, 2012), http://www.abajournal.com/news/article/court_and_probation_company_are_running_extortion_racket_alabama_judge_says/, archived at <https://perma.cc/U56U-Z8P3>. The city has accused JCS of being at fault, alleging that the

as a condition of its own settlements, including recording compliance and indigency hearings, training both prosecutors and public defenders on the mandates of *Bearden* and other constitutional rights, and barring private probation companies from operating in the city.³⁴⁴

Starting in 2016, debtors in Ferguson must be given an indigency hearing within two days for low-level traffic violations and three days for all other violations, or be released.³⁴⁵ No one may now be jailed for traffic offenses.³⁴⁶ In Ohio, new rules go further, and before imposing a fine or fee the court must convene a formal hearing at the time of sentencing. At that hearing the debtor is guaranteed representation by counsel and afforded an opportunity to demonstrate her indigency.³⁴⁷ Similarly, if she is found to be able to pay at the time of sentencing but misses payments, she is allowed to again convene a hearing to demonstrate, with the assistance of counsel, that circumstances have changed such that she is no longer able to pay.³⁴⁸ Even if a defendant has been found to have willfully refused to pay, the court must credit her for her time spent incarcerated at a rate of \$50 per day, and the total length of incarceration cannot extend beyond six months.³⁴⁹ Ohio law also distinguishes between criminal debt, which is assessed as a penalty of sentencing, and court costs or restitution, which are civil debts that can only be recoverable through civil collection methods and not through jail time.³⁵⁰

For-profit collections agencies have seen significant law reform as well. In 2013, victims of Sentinel Offender Services successfully challenged the probation company's practice of extending probation terms to continue collecting fees.³⁵¹ Georgia's House of Representatives has since passed a private probation reform bill meant to limit fees that can be charged and bring many supervision services within existing government agencies.³⁵²

These reforms can improve the system going forward, but what can municipalities do to resolve existing debts? Ferguson, Missouri, voluntarily implemented numerous reforms following the release of the DOJ Ferguson

company illegally crafted badges and seals, raised fees without notice, and threatened jail time they had no authority to impose. Kent Faulk, *Harpersville and Childersburg blame private probation company for debtors' prison claims*, AL.COM (Feb. 21, 2015), http://www.al.com/news/birmingham/index.ssf/2015/02/harpersville_and_childersburg.html, archived at <https://perma.cc/7VT7-6R9L>.

³⁴⁴ Settlement, *Mitchell v. Montgomery*, No. 2:14-cv-186 (M.D. Ala. Nov. 17, 2014).

³⁴⁵ Mann, *supra* note 337.

³⁴⁶ *Id.*

³⁴⁷ OHIO REV. CODE ANN. §§ 2947.14(A)–(B) (West 2015); see also AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 217, at 7.

³⁴⁸ OHIO REV. CODE ANN. § 2947.14(C) (West 2015).

³⁴⁹ OHIO REV. CODE ANN. §§ 2947.14(D)–(E) (West 2015).

³⁵⁰ AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 217, at 7.

³⁵¹ Nicole Flatow, *Private Probation Firm Illegally Extended Sentences, Judge Finds*, THINKPROGRESS (Sept. 24, 2013), <http://thinkprogress.org/justice/2013/09/24/2666401/private-probation-firm-illegally-extended-sentences-judge-finds/>, archived at <https://perma.cc/Y79Q-HU8L>.

³⁵² Elly Yu & Michelle Wirth, *Ga. Criminal Justice Reform Bill Revises Probation System*, WABE (Apr. 13, 2015), <http://wabe.org/post/ga-criminal-justice-reform-bill-revises-probation-system>, archived at <https://perma.cc/WLJ5-T77M>.

Report, reforms that included dismissing all cases that involved a Failure to Appear charge, clearing outstanding arrest warrants and license suspensions, and dismissing some of the oldest cases.³⁵³ As part of its class action settlement, Montgomery, Alabama, created “amnesty days” for people to clear warrants and resolve outstanding fines and fees without being jailed, and required reasonable payment plans and options for community service.³⁵⁴ New Jersey instituted a similar “Safe Surrender” program that designated certain days where people with outstanding fines could line up to appear before a judge, discuss their situation, and in most cases, reduce their fines.³⁵⁵ Eddie Restrepo, a homeless veteran with over \$10,000 in unpaid parking tickets and traffic fines, was able to get his debt reduced to \$199.³⁵⁶ Safe Surrender and amnesty programs encourage people to emerge from the shadows with the promise that they will not be incarcerated. They also allow the court system to clean up its docket and the city to recover at least some money from the vast majority of debtors.

C. Judicial Reform

Where law enforcement and city officials conspire to levy high fines and fees and over-enforce petty ordinance violations, the bastion against such abuses should be the Constitution and the courts. Even without legislative change, the judicial system can take affirmative steps to ensure that proper constitutional protections are in place by being familiar with *Bearden* and pushing back against overly coercive collection tactics. While courts and legislatures should be wary of the time and cost of turning minor violations into full-blown criminal hearings, there are many small changes that courts can make to ensure that *Bearden* is being enforced and poor violators are adequately protected.

An unlikely model in this area is Alabama. The Alabama Supreme Court used its rulemaking power to specify limits on the use of incarceration for nonpayment of post-conviction criminal fines.³⁵⁷ The court cited *Bearden* in many post-conviction parolee cases, most notably in *Snipes v. State*.³⁵⁸ Following that decision, the Alabama Supreme Court adopted Alabama Rule of Criminal Procedure 26.11, laying out several guidelines for trial court judges assessing fines. Rule 26.11 requires an indigency analysis

³⁵³ Mann, *supra* note 337.

³⁵⁴ Settlement, *Mitchell v. Montgomery*, No. 2:14-cv-186 (M.D. Ala. Nov. 17, 2014).

³⁵⁵ *All Things Considered: Court Fees Drive Many Defendants Underground*, NPR (May 21, 2014), <http://www.npr.org/2014/05/21/314607003/court-fees-drive-many-poor-defendants-underground>.

³⁵⁶ *Id.*

³⁵⁷ ALA. R. CRIM. P. 26.

³⁵⁸ 521 So. 2d 89, 91 (Ala. Crim. App. 1986) (“[I]n revocation proceedings for failure to pay fines, restitution, court costs, or supervision fees, the trial court should inquire into the reasons for the failure to pay and make specific determinations and findings in accordance with *Bearden v. Georgia*.”).

and even allows a court to consider the burden on the defendant, indigent or not, before imposing fines at all. The Rule also encourages judges to consider installment plans or deferred payment in the event of financial hardship and, in the event of nonpayment, consider wage garnishment, fine reduction, or elimination as alternatives to incarceration.³⁵⁹

Most importantly, Rule 26.11 prohibits incarceration as an automatic penalty for nonpayment: “Incarceration should be employed only after the court has examined the reasons for nonpayment.”³⁶⁰ Incarceration is further limited to one day per \$15 of fine and, if imposed pursuant to a misdemeanor or municipal ordinance violation, cannot exceed a third of the maximum term authorized for the offense.³⁶¹ Alabama state courts have invoked *Bearden* and Rule 26.11 to require that judges conduct a *Bearden* analysis.³⁶² In *Taylor v. State*,³⁶³ a probationer who failed to pay thousands of dollars in court costs was re-incarcerated by the trial court without any investigation as to why payment had not been made. The appellate court found that the trial court had an affirmative obligation to investigate the reasons for nonpayment and make factual findings before sentencing a defendant to incarceration.³⁶⁴ Interestingly, *Taylor* also held that Rule 26.11 applies to both indigents and non-indigents alike, and so courts must follow the limitations on incarceration prior to revoking probation, no matter the wealth of the defendant.³⁶⁵ However, Alabama’s repeated failure to meaningfully enforce this case law or otherwise follow its own judicial guidance, discussed *supra*, is a reminder that this type of reform alone is insufficient to enforce constitutional protections.

The simplest way to remind judges of such protections is to provide them with bench cards. Bench cards are cards that act as a sort of “cheat sheet,” summarizing particular procedures or rights. This exact measure was recently implemented in both Georgia and Ohio, where such cards on *Bearden* and the legal framework surrounding economic sanctions were given to judges.³⁶⁶ The Ohio bench card reads:

Fines are separate from court costs. Court costs and fees are civil, not criminal, obligations and may be collected only by the

³⁵⁹ ALA. R. CRIM. P. 26.11.

³⁶⁰ ALA. R. CRIM. P. 26.11(i)(1).

³⁶¹ ALA. R. CRIM. P. 26.11(i)(1)(i).

³⁶² See *Faircloth v. State*, 654 So. 2d 62, 62–63 (Ala. Crim. App. 1994) (rejecting revocation order until *Bearden* assessment could be made); see also *Moore v. State*, 706 So. 2d 265, 273 (Ala. Crim. App. 1996) (finding \$2000 per month payment plan to be unreasonably excessive, given that the court never inquired as to his ability to pay).

³⁶³ 47 So. 3d 287 (Ala. Crim. App. 2009).

³⁶⁴ *Id.* at 289.

³⁶⁵ *Id.* at 290.

³⁶⁶ Bret Crow, *Bench Card Offers Guidance On Collection of Court Fines, Costs*, COURTNEWSOHIO (Feb. 4, 2014), http://www.courtnewsOhio.gov/happening/2014/benchCards_020414.asp#.VUOhJ5NcLm4, archived at <http://perma.cc/8Y74-UJ8S>; Settlement Agreement, Ex. A, *Thompson v. DeKalb Cty.*, No. 1:15-mi-99999-UNA (N.D. Ga. Mar. 18, 2015).

methods provided for the collection of civil judgments. Sole authority exists **under R.C. 2947.14** for a court or magistrate to commit an offender to jail for nonpayment of *finis* in a criminal case. An offender **CANNOT** be held in contempt of court for refusal to pay fines. Accordingly, unpaid fines and/or court costs may neither be a condition of probation, nor grounds for an extension or violation of probation.³⁶⁷

However, one of the difficulties of judicial reform is that judges have expressed frustration and uncertainty about how to qualify people as indigent.³⁶⁸ There is “virtually no legal authority or scholarly commentary specifying how poor a defendant must be to qualify as indigent.”³⁶⁹ Each state creates its own calculation method, some indexed to the federal poverty guidelines, others based on vague and undefined standards that give individual judges broad discretion to determine indigency.³⁷⁰ A key aspect of reform must include a regularized and fair way to determine indigency—one that does not rely on NFL jackets, cigarettes, and cell phones.

I propose that a just *Bearden* hearing could involve a standardized indigency determination based on the federal poverty guidelines, with some limited discretion and flexibility to recognize indigency above the income cutoff. One suggestion for a standardized determination is qualifying as indigent any individual who makes less than 200% of the federal poverty guidelines.³⁷¹ Fairness requires the guidelines be adjusted for geographic differences in cost of living. Additionally, for defendants with incomes too high for the guidelines, I propose an opportunity for such defendants to note any significant financial burdens affecting that income, such as child support payments, dependent care costs for an elderly or disabled relative, or medical expenses. This proposal has the advantage of being simple to calculate and assess without adding onerous burdens to judges, pre-trial services, or other court personnel. Further, eliminating ambiguous factors related to clothing or utilities simplifies the *Bearden* hearing itself, avoiding complex or lengthy proceedings in which indigency becomes in effect a triable issue.

Finally, though not constitutionally required, judges should as a best practice briefly inquire about indigency as a routine aspect of imposing fines, even when a defendant does not raise the issue herself. Ideally, this inquiry should take place *before* costs, penalties, and additional fees accrue

³⁶⁷ BENCH CARD, THE SUPREME COURT OF OHIO, OFFICE OF JUDICIAL SERVS., COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (Mar. 2015), available at <http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf>, archived at <https://perma.cc/MW6L-HLP9>.

³⁶⁸ Joseph Shapiro, *Facing Doubts About Court Fines, Lawmakers Take Questions To Heart*, NPR (June 4, 2014), <http://www.npr.org/2014/06/04/318888275/facing-doubts-about-court-fines-lawmakers-take-questions-to-heart>.

³⁶⁹ Gershowitz, *supra* note 223, at 572.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 601–03 (discussing why 200% represents the ideal solution).

and *before* the violator reaches the point of nonpayment. While some may argue that this imposes too many additional costs on the court system, I argue that the alternative is even more costly. Under the present system, judges hold a hearing where they impose unpayable fines on indigent violators, then the municipality or a third party harasses the defendant for months or years in an attempt to collect. Some time later, once the defendant has not made adequate payments on the debt, a hearing on the issue of nonpayment is held at which point the defendant raises indigency as a defense, and a *Bearden* hearing must take place before determining whether to jail the defendant or reduce or alter the fine. This protracted system wastes the time and money of both the courts and the defendants that appear before them, and can easily be avoided by a single question at the moment that the fines are imposed: “Would payment of this fine seriously interfere with or prevent the provision of basic necessities for you or your family?” If the answer is yes, the court can immediately proceed to a *Bearden* hearing, eliminating every step (and every cost) in between.

D. *The European Solution: Day Fines*

Perhaps the best alternative to the current system of discretionary fines is the day fine system. Day fines originated in Scandinavia in the 1920s and have proliferated in Europe and South America.³⁷² A day fine is a proportional fine, like an income tax, that takes into account both the severity of the offense and the offender’s income.³⁷³ Any particular crime has a severity level worth a certain number of days of pay, and then the income of the defendant is calculated to determine the total fine. For example, in Finland, a day fine is equivalent to half of a daily discretionary income, which police may look up in a national database of personal earnings.³⁷⁴ The result is greater equitability among people of different economic classes and incomes³⁷⁵ and similar levels of felt hardship regardless of one’s financial station.³⁷⁶

Implementing day fines would not be without precedent in the United States. In the 1980s, pilot programs in Phoenix and Staten Island experimented with the day fine system.³⁷⁷ In Staten Island, each crime was assigned a certain number of day fine “units,” and judges were given the discretion to adjust the punishment up or down by 15% based on aggravating or mitigating factors.³⁷⁸ Income was gathered by pre-trial services³⁷⁹ and

³⁷² Hillsman, *supra* note 26, at 77.

³⁷³ Ruback & Bergstrom, *supra* note 24, at 259.

³⁷⁴ Joe Pinsker, *Finland, Home of the \$103,000 Speeding Ticket*, THE ATLANTIC (Mar. 12, 2015), <http://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/>, archived at <https://perma.cc/5LH8-U7YP>.

³⁷⁵ Ruback & Bergstrom, *supra* note 24, at 259.

³⁷⁶ Hillsman, *supra* note 26, at 51.

³⁷⁷ *Id.* at 83, 91.

³⁷⁸ *Id.* at 84–85.

determined by net daily income, adjusted downward to incorporate financial obligations to family and a “standard” adjustment for those at or near the poverty line.³⁸⁰ At the time, judges perceived them as too lenient in an age of mass incarceration and often elected imprisonment over the day fine.³⁸¹ But today, as we attempt to reduce incarceration rates, have easier access to electronic income information, and seek a more equitable form of penalty that squeezes rich and poor alike, day fines are worth revisiting.

CONCLUSION

Some law reform advocates seeking to reduce mass incarceration have embraced fines and fees as an alternative to imprisonment,³⁸² but this Note demonstrates that an unregulated fine system poses similar economic and social threats to many of the same low-income, minority communities. Ubiquitous yet often unregulated, many contemporary fine schemes are being illegally imposed in contravention of the constitutional rights of poor defendants. These schemes also contravene common sense, as attempting to extract money from the poorest among us is not a solution to either budget shortfalls or crime reduction. The primary reason why such fees have proliferated is not their efficacy at coercing certain behaviors, but rather their ability to fill the coffers of local and state governments struggling in the poor economic climate.

An essential element of reform would involve changes to the funding mechanism of court systems. Currently, the profit motive distorts criminal justice enforcement in ways that do not advance public safety. The American Bar Association and Conference of State Court Administrators have issued guidance calling on states to adequately fund their court systems without depending on revenue from fees and fines.³⁸³ Similarly, the Council

³⁷⁹ *Id.* at 90.

³⁸⁰ *Id.* at 85, 88.

³⁸¹ Pinsker, *supra* note 374.

³⁸² AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE 57 (2011), available at <https://www.aclu.org/files/assets/smartreformispossible.pdf>, archived at <https://perma.cc/W474-DUA5> (citing states that have converted jail sentences into fines for misdemeanor drug offenses); Prison Res. Educ. Action Project, *Exacerbate, PRISONPOLICY*, http://www.prisonpolicy.org/scans/instead_of_prisons/chapter6.shtml, archived at <https://perma.cc/QNC6-KB3K> (last visited Oct. 18, 2015); FAMILIES AGAINST MANDATORY MINIMUMS, ALTERNATIVES TO INCARCERATION IN A NUTSHELL 3 (2011), available at <http://famf.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf>, archived at <https://perma.cc/LG59-SPAJ>.

³⁸³ AM. CIVIL LIBERTIES UNION, *supra* note 5, at 26; see also AM. BAR ASS'N, FUNDING THE JUSTICE SYSTEM: HOW ARE THE COURTS FUNDED? 19–20 (May 2009), available at http://www.abanet.org/justice/pdf/Funding_the_Justice_System.pdf, archived at <https://perma.cc/4AA9-55JT>; CONFERENCE OF STATE COURT ADM'RS, STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES (June 1986), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=81>, archived at <https://perma.cc/7SJM-TP78> (Standards 4.1 and 4.2); CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADM'RS, COURTS ARE NOT REVENUE CENTERS 7–11 (2011), available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx>, archived at <https://perma.cc/37T8-5A5Q>. However, note that the

of State Governments Justice Center advocates curbing the extent to which government agencies rely on funding from economic sanctions.³⁸⁴ It also suggests giving lawmakers who consider increasing fines and fees an impact statement on how such an increase would affect the ability of those already burdened with legal debt to repay existing obligations.³⁸⁵

As it stands, excessive use of fines and fees not only destroys communities, but also is ineffective as both a revenue source and rehabilitator when applied to the poor. Fines, like all forms of punishment, can successfully decrease undesired behavior.³⁸⁶ When fines are used as the primary sanction for criminal offenses, they are as effective, if not more effective, at deterrence than incarceration.³⁸⁷ However, fines can also be counterintuitive if the offense is desirable or convenient and the offender has the resources to pay it. The offender can simply perceive the fine as the “price” she pays for that convenience, and the incidence of rule-breaking may increase.³⁸⁸ For the poor, however, there is no real market of choices. A fine does not deter a hungry person from stealing bread, and it does not deter a poor person whose license is expired but needs to get to work. Whether the fine is \$10 or \$1,000 is immaterial; they cannot pay, and fining them makes them poorer.³⁸⁹

Fines for Manner of Walking or Grass Too Tall are not imposed for any criminal justice ends. They are intended not to punish past crimes, deter future crimes, or rehabilitate “offenders,” and thus have no place in the criminal justice system. The indigent cannot be deterred from “crimes” that they must commit because of their poverty, particularly the crime of not paying a fine or fee. For those who lack funds, LFOs disrupt employment, child support, and childcare. This practice further criminalizes poverty and leaves those with the fewest resources with the burden of financing the very programs that target and harass them. Those unable to pay fines end up in jail or with continued court supervision, and wind up paying much more than wealthier defendants in the form of warrant, booking, supervision, and monitoring fees, as well as late penalties with high interest. This converts a single infraction or violation into a lifetime of spiraling debt that a poor person cannot escape. As such, prison reform advocates must be wary not to

ABA has also supported federal legislation that would allow the Internal Revenue System to intercept tax refunds of those with carceral debt. AM. BAR ASS'N, *New Legislation Attacks Court Debt with Expansion of Tax-Intercept Program* (Apr. 2011), http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2011/april/taxintercept.html, archived at <https://perma.cc/U7HM-P3FU>.

³⁸⁴ RACHEL L. MCLEAN & MICHAEL D. THOMPSON, *REPAYING DEBTS* 34 (2007).

³⁸⁵ *Id.*

³⁸⁶ Tim Kurtz et al., *A Fine is a More Effective Financial Deterrent When Framed Retributively and Extracted Publicly*, 54 J. EXPERIMENTAL. SOC. PSYCHOL. 170, 171 (2014).

³⁸⁷ Ruback & Bergstrom, *supra* note 24, at 262.

³⁸⁸ Kurtz, *supra* note 386 (citing a 2000 study by Gneezy and Rustichini in which fines for bringing children late to daycare actually increased the incidence of lateness).

³⁸⁹ John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 460 (2005).

overly rely on economic sanctions as alternatives to mass incarceration. Exorbitant fines and fees that the poor cannot pay do little to fill state coffers and change little about incarceration when the penalty for nonpayment is, in the end, jail time.

The person who knows this best is Danny Bearden, the plaintiff in the landmark Supreme Court case *Bearden v. Georgia*. Today, Bearden still lives in Georgia and has a steady blue-collar job:

He sees people—his co-workers, his neighbors, his friends—get charged for things like driving offenses. Only now, he says, fines and fees add up to thousands of dollars. “These are poor people, OK? They got families and everything like that,” he says. “They work a job. And even when they get behind in trying to pay, they go to jail.”³⁹⁰

Bearden argued back in 1983 that the Constitution does not permit jailing people who are too poor to pay a fine. The Supreme Court agreed with him. Yet thirty-three years later, he still waits to see something change.

³⁹⁰ Shapiro, *supra* note 224.