

ECONOMIC LIBERTY AND CRIMINAL JUSTICE

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Thank you for having me. I'm going to be talking about non-forfeiture economic sanctions and just to make sure we are all on the same page, I am going to give a quick overview of the basic types of economic sanctions that are most prevalently used around the country.

So, obviously, a statutory fine is the most common type of economic sanction,¹ although we also have what are called surcharges in many jurisdictions.² Surcharges are essentially fines on top of fines that are typically targeted at particular funds.³ For example, if you are ticketed for a traffic violation, you might pay a surcharge to fund night court, to fund teen court, or to fund public services like public parks.⁴ Often, a surcharge funds things that have literally nothing to do with the criminal justice system.

In addition to those fines and surcharges, there is a common use of administrative fees, sometimes called user fees.⁵ For example, you might have to pay more if you opt for a jury trial,⁶ you might have to pay for the cost of your pretrial incarcera-

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1. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285 (2014) [hereinafter *Reviving the Excessive Fines Clause*].

2. *Id.*

3. *Id.*; see also Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 33 (2018) [hereinafter *Challenging the Modern Debtors' Prison*].

4. 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 10 (2015), <https://lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf> [https://perma.cc/JPP6-GZM8]; Tyler Whitson & Joy Diaz, *Why Your Speeding Ticket Doesn't Pay For What You Think it Does*, KUT NEWS (Apr. 22, 2015), <https://www.kut.org/post/why-your-speeding-ticket-doesn-t-pay-what-you-think-it-does> [https://perma.cc/YH9F-E25K].

5. See Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 3, at 35–36.

6. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 286.

tion, or you might have to pay for your post-conviction incarceration.⁷ You might have to pay for things like—and this one usually surprises people—the cost of the public defender you only qualify for because you are too indigent to pay.⁸ As a result, these fees get tacked on and add up, and at times can surpass the amount of the fine in question.⁹

Another type of economic sanction that is in use in some but not all cases is victim restitution,¹⁰ which has a very different purpose that creates some interesting policy and constitutional questions that I'm happy to talk about.

Taken together, those are the general forms of economic sanctions we use. And we use them at all levels of cases, from traffic and low-level ordinance violations all the way up to the most serious of felonies. And we use them in juvenile courts as a form of punishment as well.¹¹

What happens if you cannot pay economic sanctions? For those who cannot pay immediately, the consequences can result in more debt. Oftentimes you have to pay collections costs and interest costs, and in many jurisdictions you have to pay a fee to be set up on a payment plan.¹² There can be additional fees if you cannot pay in the form that is preferred. If you are late on a payment, the fees may be so high that it effectively doubles the principal at stake.¹³ There are also other sanctions that can occur if you are unable to pay immediately. Your pro-

7. Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, APPEAL (July 20, 2018), <https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail/> [<https://perma.cc/2BZY-WXUX>]; Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, ATLANTIC (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/> [<https://perma.cc/NND8-VU9W>].

8. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 286–87; see also 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, 329–34 (2009).

9. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 286, 288–89.

10. *Id.* at 285.

11. JESSICA FEIERMAN, JUVENILE LAW CTR., DEBTORS' PRISONS FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6 (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> [<https://perma.cc/Q6YE-EWDW>]; Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 285–86, 285 n.25.

12. Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 288–91.

13. *Id.* at 289, 291.

bation and parole might be extended¹⁴ and therefore the fees accompanying being on probation and parole increase as well. You may lose your driver's license in many states,¹⁵ which has serious repercussions for people's financial well-being.¹⁶ In some places, if you have been disenfranchised because of the nature of the conviction, the inability to vote is extended because you cannot pay.¹⁷ In many places, the response to non-payment is incarceration.¹⁸

Now, all of those responses are arguably, and in some cases flatly, unconstitutional,¹⁹ but they are very prevalent across the United States.

The reality is that many people cannot pay. To give you a picture of what we are talking about here, the 2017 Supplemental Poverty Measure showed that fourteen percent of people in the United States are living below the federal poverty line.²⁰ Even if they are earning minimum wage, in most states the minimum wage rate is so low that even adjusted for the earned income tax credit, a family of three would be unable to meet their basic needs.²¹ What we know from the Federal Reserve's Report on

14. See, e.g., ALA. CODE § 15-18-62 (2018); ARIZ. REV. STAT. ANN. § 13-915 (Supp. 2019); CAL. PENAL CODE § 1203.2(a) (Supp. 2020); COLO. REV. STAT. ANN. § 18-1.3-702(3) (Supp. 2019); MO. REV. STAT. § 559.100 (2016); N.Y. CRIM. PROC. LAW § 420.10(3) (McKinney Supp. 2019); TEX. CODE CRIM. PROC. ANN. art. 43.03(a) (West 2018).

15. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 24 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/JJ5Y-Z6EP>]; MARIO SALAS & ANGELA CIOLFI, LEGAL AID JUSTICE CTR., DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 1-4 (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf> [<https://perma.cc/S4J6-TVQ5>].

16. See SALAS & CIOLFI, *supra* note 15, at 5.

17. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019); Karin Martin & Anne Stuhldreher, *These people have been barred from voting today because they're in debt*, WASH. POST (Nov. 8, 2016, 3:00 AM), <https://www.washingtonpost.com/posteverything/wp/2016/11/08/they-served-their-time-but-many-ex-offenders-cant-vote-if-they-still-owe-fines/> [<https://perma.cc/SA7C-FLBA>].

18. See BANNON ET AL., *supra* note 15, at 19.

19. See *infra* notes 72-80 and accompanying text.

20. LIANA FOX, U.S. CENSUS BUREAU, THE SUPPLEMENTAL POVERTY MEASURE: 2017, at 1-2 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-265.pdf> [<https://perma.cc/2QF8-B5RS>].

21. David Cooper, *The Minimum Wage Used To Be Enough To Keep Workers Out Of Poverty—It's Not Anymore*, ECON. POL'Y INST. (Dec. 4, 2013), <https://www.epi.org/>

the Economic Well-Being of U.S. Households in 2017 is that about a quarter of adults cannot pay their monthly bills, so they are skipping things like basic necessities, food, housing, hygiene, etc.²² About a quarter are skipping necessary medical needs, so they are not able to access medication or other types of care.²³ Nearly half of adults in the United States—four out of ten—would be unable to pay an unexpected \$400 expense without having to either sell off personal property or take out loans.²⁴ Because nine million households in the United States are unbanked,²⁵ that means going to more expensive options like payday loans.²⁶ If you cannot pay, you end up in a Kafkaesque position—costs continue to stack up pushing you further into a hole and the cycle of not being able to pay and the risks that creates continues on.

This is particularly difficult for people with felony convictions or who are returning from periods of incarceration.²⁷ Now, why might that be? You heard in the last panel a little bit about occupational licensing restrictions.²⁸ In many states, one of the collateral consequences of a conviction is restrictions on occupational licensing.²⁹ For instance, you might not be able to

publication/minimum-wage-workers-poverty-anymore-raising/ [https://perma.cc/R9CS-HDEM]; Carey Anne Nadeau & Amy K. Glasmeier, *Bare Facts About the Living Wage in America 2017–2018*, LIVING WAGE (Aug. 30, 2018), <http://livingwage.mit.edu/articles/31-bare-facts-about-the-living-wage-in-america-2017-2018> [https://perma.cc/VC6U-FFHQ].

22. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, at 5–7 (2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> [https://perma.cc/9LUN-NJXC].

23. *Id.* at 23.

24. *Id.* at 21.

25. *Id.* at 25.

26. *Id.*

27. BETH A. COLGAN, BROOKINGS INST., ADDRESSING MODERN DEBTORS' PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY 8–9 (2019), https://www.brookings.edu/wp-content/uploads/2019/03/Colgan_PP_201903014.pdf [https://perma.cc/8E68-CHVT].

28. See Panel Discussion at the Federalist Society National Student Symposium, *Is Economic Protectionism a Legitimate State Interest?* (Mar. 16, 2019).

29. See Alec C. Ewald, *Barbers, Caregivers, and the "Disciplinary Subject": Occupational Licensure for People with Criminal Justice Backgrounds in the United States*, 46 FORDHAM URB. L.J. 719, 732–33 (2019) (discussing broad collateral consequences of criminal convictions on state occupational licensing and providing an in-depth examination in the fields of barbering and nursing).

get a driver's license that allows you to operate commercial vehicles,³⁰ you might not be able to become a barber,³¹ and you might not be able to engage in all sorts of occupations that have literally nothing to do with the crime of conviction.³² In many jurisdictions, that marginalization continues until you complete your sentence. Therefore, if you can't complete probation and parole because you can't pay off the economic sanctions that are a condition of your probation and parole, you are still excluded from the economy.³³

Of course, there are also other limitations on occupations for people coming out of incarceration, including straightforward employer reluctance to hire.³⁴ But also employer reluctance may be in part because in many states, one of the collection mechanisms is garnishment, which creates another hurdle because employers have to deal with the administrative hassle of garnishment processes.³⁵ Of course, this is particularly bad for

30. See Adam Edelman, *Inmates who learn trades are often blocked from jobs. Now something's being done.*, NBC NEWS (May 26, 2018, 7:09 AM), <https://www.nbcnews.com/politics/politics-news/inmates-who-learn-trades-are-often-blocked-jobs-now-something-n877666> [https://perma.cc/8MP6-S8QG] (discussing licensing barriers that people face when reentering the workforce in particular fields).

31. See Ewald, *supra* note 29, at 732–33; see also, Elizabeth Hardison, *Ex-offenders in Pa. can be denied professional licenses because of old convictions. Bipartisan lawmakers want to change that*, PA. CAP.-STAR (May 23, 2019), <https://www.penncapitalstar.com/criminal-justice/ex-offenders-in-pa-can-be-denied-professional-licenses-because-of-old-convictions-bipartisan-lawmakers-want-to-change-that/> [https://perma.cc/4F7L-RJQB] (explaining how people can be denied occupational license under current Pennsylvania law).

32. *Barriers to Work: People with Criminal Records*, NAT'L CONF. ST. LEGISLATURES, (July 17, 2018), <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [https://perma.cc/4E6J-3MYF].

33. See, e.g., TARA GAMBOA-EASTMAN, W. CTR. ON LAW & POVERTY, *THE PROBLEM WITH PROBATION: A STUDY OF THE ECONOMIC AND RACIAL IMPACT OF PROBATION FEES IN CALIFORNIA 4* (2018), https://wclp.org/wp-content/uploads/2018/06/TheProblemWithProbation_GamboaEastman_ForWCLP_Final.pdf [https://perma.cc/DNT4-QDWT] (the inability to pay off criminal justice fees can lead to insurmountable debts, lower credit scores that affect one's ability to secure housing and employment, and re-incarceration).

34. Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> [https://nyti.ms/1C8KVBq].

35. See, e.g., BANNON ET AL., *supra* note 15, at 11, 27 (mentioning garnishment as a collection tool for criminal justice debt); Randall J. Groendyk, *Garnishments: A*

people of color who are more likely to be returning to communities with stagnant economies.³⁶

There are strong arguments that the imposition of unmanageable criminal debt is incompatible with criminal justice goals in the United States. One of the main goals of criminal justice is equality in sentencing.³⁷ But one of the things we know is that in the context of economic sanctions, we're effectively punishing not just the individual who committed the offense, but the entire family. It is often family members who are paying the debt rather than the person who was incarcerated.³⁸ If you are incarcerated, if you are lucky enough to be able to get a job in prison—which is not true for most people—your wages could be cents per hour.³⁹ That's not going to make much of a dent in these kinds of bills, and so families end up paying. It's not obvious that we're getting to the criminal justice goal that people convicted of the same offense should be treated equally if people who haven't been convicted at all are paying.

Another criminal justice goal is deterrence. There are some studies that investigate the effect of recidivism with respect to the use of fines. As a general matter, what we see is that this research indicates that the imposition of higher rates of economic

Trap for Employers, NAT'L L. REV. (Dec. 17, 2011), <https://www.natlawreview.com/article/garnishments-trap-employers> [https://perma.cc/6JHL-BTF9] (describing how garnishment affects employers under Michigan law).

36. See Breanne Pleggenkuhle, *The Financial Cost of a Criminal Conviction*, 45 CRIM. JUST. & BEHAV. 121, 124 (2018); see also CHRISTIAN E. WELLER, JARYN FIELDS & FOLAYEMI AGBEDE, CTR. FOR AM. PROGRESS, *THE STATE OF COMMUNITIES OF COLOR IN THE U.S. ECONOMY* 1–3 (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/01/pdf/comm_of_color.pdf [https://perma.cc/3MLN-ZHQA] (describing how the Great Recession of 2007 to 2009 further perpetuated economic disparities and insecurity for communities of color).

37. See, e.g., Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 127 (2010) (positing that the United States has a commitment to equality in sentencing regardless of a defendant's race or gender).

38. ELLA BAKER CTR. FOR HUMAN RIGHTS ET AL., *WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES* 7, 9 (2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [https://perma.cc/N4B9-6S8B]; Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSP. ON POL. 638, 638–40 (2015).

39. *State and federal prison wage policies and sourcing information*, PRISON POL'Y INST. (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html [https://perma.cc/W6V5-CW7U].

sanctions or imposition of sanctions beyond a manageable amount leads to recidivism.⁴⁰ That result is found in studies that aren't attending to just unmanageable sanctions, but the use of economic sanctions overall. For example, a recent study analyzing the use of economic sanctions in juvenile court found that both imposing restitution and increasing the overall sanction amounts contributed to recidivism.⁴¹ The study also found that the continuation of the debt beyond the scope of the juvenile court—because in many jurisdictions the debt rolls over into adulthood even if you can otherwise not be under juvenile court jurisdiction—significantly contributed to later recidivism.⁴²

A few additional recent studies, based on self-reporting, focus on people with unmanageable criminal debt. What these studies show is that a significant percentage of people are engaging in criminal activity for the specific purpose of paying past criminal debt.⁴³ This usually involves crimes like drug sales, prostitution, and theft.⁴⁴ It is not unsurprising that, in many cases, unmanageable criminal debt is criminogenic because of the consequences I was talking about earlier.⁴⁵ It makes it less likely that you're going to have a driver's license that allows you to drive to work, it makes it less likely you'll be employed, it makes it less likely that you'll have housing, and it

40. See COLGAN, *supra* note 27, at 9–11 (summarizing research on the implications of economic sanctions for deterrence).

41. Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325, 334 (2017).

42. *Id.*

43. See ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 31 (2018), <http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> [https://perma.cc/YB5F-EBRZ]; FOSTER COOK, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT STUDY 11–12 (2014), https://www.prisonpolicy.org/scans/uabtasc/the_burden_of_criminal_justice_debt_in_alabama-part_1_main_report.pdf [https://perma.cc/EQ5Z-W2T5]; Alexis Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1785 (2010).

44. ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., *supra* note 43, at 31.

45. See *supra* notes 12–18 and accompanying text.

even interrupts family connections. That is all criminogenic; studies routinely tie those circumstances to increased recidivism.⁴⁶

One note of caution about relying on deterrence is that, as a theory, deterrence depends on the concept that people are making a choice about whether or not to behave within the confines of the law. But many of the offenses that we are talking about here are crimes of poverty.⁴⁷ A common punitive response, for instance, to people who are sleeping outdoors because they're homeless, and therefore are convicted of trespass is a fine. The idea that that person had the choice not to engage in the criminal activity is illusory.

This undermining of deterrence and all of these other problems I've discussed create a massive problem with respect to system legitimacy.⁴⁸ This, of course, blew up in the public consciousness after Ferguson,⁴⁹ but the idea that there are municipal and county and state governments that prize revenue generation over fairness in the criminal justice system has legitimacy consequences, both for people who are criminal justice involved and the broader community.⁵⁰ Perhaps unsurprisingly, then, we've seen a bipartisan pushback to these kinds of practices.⁵¹

46. See JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 13 (2012), <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF> [<https://perma.cc/5SQC-A9EM>] ("Housing . . . for formerly incarcerated persons is a critical component in the reentry process."); CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INST. & FANNIE MAE FOUND., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 8 (2004), <https://www.urban.org/sites/default/files/publication/58121/411096-Taking-Stock.PDF> [<https://perma.cc/8F8M-UZPV>] ("[P]arole violation and rearrest may be more likely for those prisoners with no place to go upon release."); Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION 147, 165 (2004) (recognizing the importance of family reunification and employment in successful reentry); Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 412–13 (2005) (finding both absolute and relative economic deprivation contribute to criminal conduct).

47. See ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., *supra* note 43, at 30.

48. COLGAN, *supra* note 27, at 11.

49. See, e.g., Raven Rakia, *It's Not Just Ferguson: Cities nationwide are criminalizing black people to pay the bills*, NATION (Mar. 5, 2015), <https://www.thenation.com/article/its-not-just-ferguson/> [<https://perma.cc/UBV6-EALC>].

50. See Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 3, at 57–61.

51. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 60 n.46 (2017) [hereinafter *Graduating Economic Sanctions*] (docu-

At the same time, we're seeing that many municipalities and even state governments are dependent on these economic sanctions for funding all kinds of public services.⁵² Interestingly, even cities that are not particularly dependent—in other words, that the money generated does not make up a significant part of their budget—heavily employ economic sanctions. One recent study has shown that the use of economic sanctions increases along with the percentage of the community that's African American.⁵³

What about outside of the criminal justice system? What are the consequences of these practices? Well, as I mentioned, there's decreased economic stability for both debtors and their families.⁵⁴ There have been, for instance, studies that suggest that these practices result in decreased child support payments.⁵⁵ There is also a recent study in Alabama that showed that eighty-three percent of the respondents had to skip basic needs for themselves and their families.⁵⁶ All of this, of course, affects credit records, which, in turn, makes it harder to find stable housing and employment, trapping people and their families in a cycle of punishment and poverty.⁵⁷

There are all of these problems with this system, and so we need to think about solutions and I'm going to throw a handful of both policy and constitutional law issues out, and if you want to talk about these things in Q and A, I'm happy to do so.

menting bipartisan and nonpartisan support for reforming current economic sanctions regime).

52. See, e.g., Mike Maciag, *Addicted to Fines: Small towns in much of the country are dangerously dependent on punitive fines and fees*, GOVERNING (Sept. 2019), <https://www.governing.com/topics/finance/gov-addicted-to-fines.html> [<https://perma.cc/5P2Y-K3UZ>].

53. Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090 (2017).

54. See *supra* notes 12–18 and accompanying text.

55. See RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., *REPAYING DEBTS 2* (2007), https://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_summary.pdf [<https://perma.cc/WNM9-RJWG>]; see also Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 645 (2012) (discussing how incarceration, penalties, and fees lead to an accumulation of child support arrearages that are inevitably not paid off).

56. ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., *supra* note 43, at 4.

57. BANNON ET AL., *supra* note 15, at 27; Applebaum, *supra* note 34.

The first one I think you're going to love and it's raise taxes.⁵⁸ Now, I know, I know, you've let a progressive into the room, and this is what happens. Okay, so here's the deal: we have grossly underfunded our court systems, our law enforcement, our prosecutors, and especially our public defenders over time.⁵⁹ That has real consequences including that there are no attorneys in the room to make the kinds of constitutional arguments I'm going to talk about in a moment.⁶⁰ Now, one way to begin fixing these problems is to raise taxes—that's just the honest answer. And keep in mind, these economic sanctions *are* regressive taxes.⁶¹

Of course, if fewer things were crimes, then we would have fewer expenses related to collections of criminal debt, incarceration, probation, and parole. So another potential reform is legalization. And I'm not just talking about marijuana; there are all sorts of crimes on the books that are arguably more about social control than public safety.⁶² We have to talk about that.

58. E.g., Lisa Foster & Joanna Weiss, Opinion, *American Courts should not be turned into revenue machines*, HILL (June 8, 2018), <https://thehill.com/opinion/judiciary/391449-american-courts-should-not-be-turned-into-revenue-machines> [<https://perma.cc/T2AB-J5S8>] (explaining how fines and fees damage public safety and harm low-income communities of color, and suggesting that New York should raise taxes on all citizens and eliminate fines and fees).

59. See John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at 18; see also Maura Dolan & Victoria Kim, *Budget cuts to worsen court delays; Extended waits for suits to reach court, longer custody fights and lengthy traffic ticket battles are seen*, L.A. TIMES, July 20, 2011, at A1.

60. See *infra* notes 72–80 and accompanying text.

61. See COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1–3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/LRP7-FCSZ>].

62. See, e.g., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–78 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/C3RK-YVYR>] (describing law enforcement targeting of African Americans through the use of offenses such as “Manner of Walking in Roadway” and failure to comply); Coty R. Miller & Nuria Haltiwanger, *Prostitution and the Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 229 (2004) (discussing the status of the law regarding the sex trade in various states and examining the ongoing legalization debate).

We need to talk about graduating economic sanctions according to ability to pay.⁶³ Now, this is something that's increasingly used.⁶⁴ I'm happy to talk about institutional design,⁶⁵ but it's something that people on the right are really getting behind. So, the American Legislative Exchange Council (ALEC), for example, passed a resolution not long ago calling for this policy response.⁶⁶

We can talk about things like reforming collateral consequences, including through strict limitations on occupational and driver's license restrictions that I was talking about earlier.⁶⁷

We need to have a conversation about the scope of probation and parole. In the last panel, the panelists were talking about arbitrary bureaucracy.⁶⁸ If you want arbitrary bureaucracy, you should look at the way probation and parole are managed in the United States.⁶⁹ If any of you are looking for a law review comment to write, present a conservative approach to reforming that practice. That would be incredible.

63. See generally Colgan, *Graduating Economic Sanctions*, *supra* note 51 (exploring institutional design of a system of graduating economic sanctions). For a discussion of the difficulties of designing a system for graduation to avoid racial injustice, see Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175 (2019).

64. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 42.15 (West 2018); *Can't Afford to Pay*, SUPERIOR CT. CAL. COUNTY S.F., <https://www.sfsuperiorcourt.org/divisions/traffic/cant-afford-pay> [<https://perma.cc/V2NT-X5G3>] (last visited Sept. 16, 2019).

65. See Colgan, *Graduating Economic Sanctions*, *supra* note 51, at 73–103 (discussing key institutional design concerns including artificial inflation, consideration of income sources, and statutory maximum caps).

66. *Resolution on Criminal Justice Fines and Fees*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 12, 2016), <https://www.alec.org/model-policy/resolution-on-criminal-justice-fines-and-fees> [<https://perma.cc/DVR9-LRA9>] (“Therefore Be It Resolved that when imposing fines and fees the offender’s ability to pay should be taken into account as one factor . . .” (emphasis omitted)).

67. See *supra* notes 12–18 and accompanying text.

68. See *supra* note 28.

69. See *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, COUNCIL ST. GOV'TS JUST. CTR., <https://csgjusticecenter.org/confinedandcostly/> [<https://perma.cc/4TP4-57LB>] (last visited Sept. 16, 2019); *Statement on the Future of Community Corrections*, COLUM. JUST. LAB (May 17, 2018), <https://justicelab.columbia.edu/statement-future-community-corrections> [<https://perma.cc/WDF8-GCZ3>].

We also need to talk about alternative methods of responding to what are now criminal justice issues.⁷⁰ We don't have to incarcerate everyone, we don't have to put everyone on probation and parole, and we don't have to fine people into poverty. There are alternative responses, and I'm happy to talk about some examples of that in Q and A.

Now, one of the problems here is because of the economic dependence that many lawmakers have on these practices, they may not be willing to move forward without a push and so that's where constitutional litigation can come in.⁷¹ I'm just going to tell you about, without detail, four quick arguments you could make that, again, I'm happy to talk about in the Q and A.

One claim is based on a series of due process cases dating back to the 1920s that say that it is a violation of due process for the judge that is imposing the economic sanction to have a conflict of interest.⁷² In other words, where judges are dependent either for their own purposes—their own salary—or to fund the courts generally. That's what's happening in many of these jurisdictions.

There's also a longstanding case from the 1980s, *Bearden v. Georgia*,⁷³ which is a combined equal protection and due process case that makes it flatly unconstitutional to incarcerate someone for nonpayment when they have no ability to pay unless there is no other way for the state to satisfy its penal interest.⁷⁴ That is a high bar, so in nearly all cases, if we're revoking or extending the terms of probation or parole or incarcerating someone for nonpayment, that is just unconstitutional.⁷⁵

There are also Excessive Fines Clause arguments,⁷⁶ which would be arguments made at sentencing. I'm sure you all saw

70. See, e.g., DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

71. See Colgan, *Graduating Economic Sanctions*, *supra* note 51, at 61.

72. See, e.g., *Connally v. Georgia*, 429 U.S. 245, 250 (1977); *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

73. 461 U.S. 660 (1983).

74. *Id.* at 672–73.

75. *Id.*

76. U.S. CONST. amend VIII; Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 3, at 2.

about *Timbs v. Indiana*,⁷⁷ where the Excessive Fines Clause was just incorporated against the states thanks to the good work of the Institute for Justice.⁷⁸ There are all sorts of issues there including that the states are now trying to reverse progress made under the Excessive Fines Clause regarding civil asset forfeiture. But there are also other questions, such as does ability to pay matter for the excessiveness inquiry. Again, I'm happy to talk about those things.

All of this really also comes down to the right to counsel, which is currently under attack by some of the Justices on the Supreme Court.⁷⁹ The Sixth Amendment right to counsel does not apply if only fines or forfeitures are at issue.⁸⁰ That doesn't mean that the right couldn't be extended. But if there's no attorney in the room to preserve issues for appeal, that question or any other constitutional issue doesn't get to the Supreme Court, and so that's a real problem here.

The last thing I'll say is the Constitution is a floor and not a ceiling. One of the things that we've seen in a lot of conservative states recently is a push for statutory right to counsel, as opposed to a constitutional right to counsel,⁸¹ in order to make sure that these kinds of claims can be preserved and that people are treated fairly in the system. Some conservative lawmakers are taking the lead on that, and I hope to see that work extend further.

I'll end there.

77. 139 S. Ct. 682 (2019).

78. *Id.* at 687; see *Timbs v. Indiana: There are Limits: IJ Takes Excessive Fines Case to the U.S. Supreme Court*, INST. FOR JUST., <https://ij.org/case/timbs-v-indiana/> [<https://perma.cc/7UKQ-LAZA>] (last visited Sept. 16, 2019).

79. See *Garza v. Idaho*, 139 S. Ct. 738, 756–59 (2019) (Thomas, J., dissenting).

80. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

81. See, e.g., Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, MARSHALL PROJECT (Sept. 22, 2017, 1:15 PM), <https://www.themarshallproject.org/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor> [<https://perma.cc/JS8G-2Q83>].