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The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States

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The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States

Lisa Foster*

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I. INTRODUCTION

Layne is from Washington: “And then you also have these legal financial obligations that, if you do not pay them, you risk being put in jail . . . What it was really doing is sentencing people to even more length of time tied to the court systems and not really letting us move forward with the things that we needed to do in order to be successful in re-entry and not go back to prison.”¹

Qiana is from Missouri: “Upon going to court, I was asked to pay what I could, and I did that, every month — twenty dollars or whatever I could pay, until you eventually miss a court date, or you just don’t have the money to pay, and you get a warrant. . . . nobody wants to hire a person who has a warrant out for their arrest. It doesn’t say that it’s for a traffic ticket, it only says I’m a fugitive . . . And so I was forced to do odd jobs. For twenty years—I’ve done odd jobs all my life.”²

Leah is from Minnesota: “I originally got a traffic ticket . . . that I couldn’t afford to pay for at the time . . . I found out the first time that my license was suspended on the side of the highway . . . Part of my job was driving . . . and then I had to go to my second job . . . My boss made it pretty, like, clear that I’m not fit for this position . . . I paid about \$900 just to get my license reinstated.”³

Crystal is from Tennessee: “I think the system is set up for you to fail, because . . . [o]nce you get on probation . . . it’s just one fee after another and if you

¹ Doug Nadvornick, *Spokane Group Plans Event to Lower Debt for Formerly Incarcerated People*, SPOKANE PUBLIC RADIO (Feb. 4, 2020), <https://www.spokanepublicradio.org/post/spokane-group-plans-event-lower-debt-formerly-incarcerated-people>.

² See generally The White House, *A Cycle of Incarceration: Prison, Debt, and Bail Practices*, at 2:00-2:04 YOUTUBE (Dec. 13, 2015), <https://www.youtube.com/watch?v=ErcSHP12deE>.

³ Fines and Fees Justice Center, *Leah’s Story: One unaffordable ticket led to license suspension and \$14,000 in costs*, YOUTUBE (Sept. 11, 2019), https://www.youtube.com/watch?v=K2smLLAT97k&feature=emb_title.

can't pay then you go to jail, and then once you're in jail and then you get out, you have more court fees, and [then] more fees, and more, and more, and more. It never ends . . .”⁴

Maleah is from Pennsylvania: “You're taking people that have nothing and demanding that they pay something.”⁵

These five people are not alone. Throughout the United States, state and local courts impose stiff fines and fees on people convicted of criminal and civil offenses, including minor traffic and municipal code violations, misdemeanors and felonies. The total amount of a person's court debt can range from hundreds to thousands of dollars, and if a person cannot afford to pay their fines and fees immediately, a cascade of harsh consequences ensues. Since the late 1980's, and coincident with the rise in mass incarceration, state and local legislators in the United States have dramatically increased the number and value of fines and fees imposed through the justice system. These fines and fees, which are also assessed in juvenile proceedings against children or their parents or guardians, were initially used to fund the justice system. In the ensuing decades, as political pressure to reduce or minimize taxes increased and federal funding for criminal justice decreased, fines and fees became increasingly popular as a revenue source, not exclusively for the justice system, but also for other government services and general fund revenue.

Fines and fees in the justice system hurt millions of Americans, entrenching them in poverty, exacerbating racial disparities, diminishing trust in courts and police, and trapping people in perpetual cycles of punishment. Millions of people who cannot afford to immediately pay the full amount charged face additional fees, license suspensions, loss of voting rights, and, far too frequently, arrest and jail. The problem of fines and fees in the American legal system first came to national attention after the United States Department of Justice released its report on the Ferguson, Missouri police department in 2015, following a police officer's

⁴ Komala Ramachandra, “*Set up to Fail*”: *The Impact of Offender-Funded Private Probation on the Poor*, HUMAN RIGHTS WATCH (Feb. 20, 2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor#page>.

⁵ Juliette Rihl, *Court fines and fees generate important revenue. But for some people, they're an insurmountable hurdle*, PUBLIC SOURCE (Feb. 6, 2020), <https://projects.publicsource.org/true-cost-of-court-debt/part-one.html>.

fatal encounter with Michael Brown, an unarmed Black man.⁶ Since then, advocates around the country have focused on the problem, and significant reforms have been adopted at the state and local level. But millions of people are still subjected to a tax on justice they cannot afford to pay, which criminalizes poverty in our most vulnerable communities—particularly in communities of color.

That vulnerability has only been exacerbated by the COVID-19 pandemic. The virus has, disproportionately harmed Black and Brown communities both with respect to their health⁷ and their economic security.⁸ The people whom government expects to pay billions of dollars in fines and fees are disproportionately sick, dying, and out of work. Even if they could have paid their court debt prior to the pandemic, they are unable to now. At the outset of the COVID-19 crisis, many jurisdictions seemed to recognize this reality and provided relief from court debt by imposing moratoria on collections.⁹ But all were temporary, expiring as stay-at-home orders were lifted, despite the fact that unemployment levels, particularly in Brown and Black communities, remained disproportionately high. The COVID-19 crisis has exposed the instability and inefficiency of attempting to fund government—in particular the justice system—through fines and fees. Revenue from fines and fees is

⁶ See U.S. Dep't of Just. Civil Rights Div., *Investigation of the Ferguson Police Department* 1, 5 (Mar. 4, 2015) [hereinafter *Investigation of the Ferguson Police Department*] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁷ See Stephanie Soucheray, *US blacks 3 times more likely than whites to get COVID-19*, CIDRAP NEWS (Aug. 14, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/08/us-blacks-3-times-more-likely-whites-get-covid-19>.

⁸ See *Unemployment rate during COVID-19 highest among Hispanic and Black Americans*, USA FACTS (June 2, 2020), <https://usafacts.org/articles/unemployment-rate-during-covid-19-highest-among-hispanic-and-black-americans/>.

⁹ See *COVID-19 Crisis: FFJC Policy Recommendations and Policy Tracker*, FINE AND FEES JUSTICE CENTER (May 28, 2020), <https://finesandfeesjusticecenter.org/articles/ffjc-policy-recommendations-for-the-covid-19-crisis> (recommending the suspension of court fees); Jessica Feierman and Jeffrey Selbin, *Moratorium on Juvenile Court Fees and Fines Can Ease Family Burdens During COVID-19*, JUVENILE JUSTICE INFORMATION EXCHANGE (May 2020), <https://jjie.org/2020/05/11/moratorium-on-juvenile-court-fees-and-fines-can-ease-family-burdens-during-covid-19/> (“California, Nevada and New Jersey abolished juvenile fees or fines, and both houses of the Maryland legislature passed a juvenile fees and fines repeal bill on the last day before adjourning because of the pandemic. Cities and counties in states as diverse as Kansas, Louisiana, Pennsylvania, Tennessee and Wisconsin have all ended at least some juvenile fees.”); *Payment of Fines and Fees During the COVID-19 Outbreak*, JUSTIA: COVID-19 LAWS AND LEGAL RESOURCES (May 2020), <https://www.justia.com/covid-19/impact-of-covid-19-on-criminal-cases/payment-of-fines-and-fees-during-the-covid-19-outbreak/> (stating that courts in California, Illinois, Florida, Georgia, among others have extended payment for deadlines for fines and fees, and others have suspended the accumulation of interest related to the debts).

down dramatically both because people cannot afford to pay and because law enforcement has issued far fewer tickets for minor traffic violations. Fines and fees were always a shaky foundation on which to rest government funding, and the pandemic has made plain that the building is collapsing.

This article provides an introduction to the problem of fines and fees in the U.S. criminal legal system and an overview of some of the solutions being explored. It begins by describing why fines and fees are problematic, including an explanation of how fines and fees criminalize poverty, particularly in communities of color. It then provides a brief overview of the constitutional doctrines that may apply to fines and fees laws and practices. Finally, this article highlights some of the reform measures adopted across the country and argues that the justice system's criminalization of poverty can only be stopped by eliminating fees in the legal system and making fines proportionate to the offense and the individual.

II. THE SCOPE OF THE PROBLEM

Over the past 40 years, the use of monetary sanctions in the criminal legal system in the United States has metastasized, invading every aspect of an individual's encounter with the law. The increase in the number and value of fines and fees is coincident with the rise of mass incarceration; and mass incarceration, in turn, has been used by policymakers to justify the increased fines and fees. Although policy makers often characterize monetary sanctions as "user fees,"¹⁰ state and local legislators have used the criminal legal system to fund a plethora of government services that have nothing to do with the justice system. The result has been to impose monetary obligations in amounts the majority of people in the criminal legal system cannot afford to pay.

Although fines and fees are both monetary sanctions imposed by courts, they serve different functions and have different histories. Fines are a monetary sanction imposed for the violation of a law¹¹. Although fines have been part of the Anglo-American legal system since before Magna Carta, historically they were imposed as an alternative to jail or prison—a sanction for infractions too minor to merit incarceration.¹² That

¹⁰ Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines* 6 (2019).

¹¹ *Fine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹² See Holt, J. C., *Magna Carta*, Cl. 20, CAMBRIDGE UNIVERSITY PRESS (1992) ("[F]or a trivial offence a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly . . ."); see also FLA. STAT. § 893.15 (2019).

is still the case today, particularly for traffic and parking offenses, but fines can also be imposed in addition to a term of custody or probation. In Florida, for example, graffiti is a second-degree misdemeanor, which is punished by up to sixty days in jail and up to a \$500 fine.¹³ In felony cases, particularly with respect to drug offenses, some states require judges to impose mandatory minimum fines that can be as high as \$750,000,000 in addition to a mandatory prison sentence.¹⁴

In addition to fines, state and local governments in the United States also impose additional monetary sanctions. Known as fees, costs, surcharges, or assessments (hereafter collectively referred to as “fees”), they are imposed to access services or to fund the justice system or other government programs.¹⁵ Fees are ubiquitous in the criminal legal system today, although they vary enormously from state to state and even within states. They are called different things in different places; they are assessed for different purposes and they fund different programs. The range and number of these monetary sanctions are difficult to overstate, in large part as a consequence of federalism. Not only does the United States have fifty-one different state court systems – one in each state and the District of Columbia – thirty-four states also have municipal courts that often exist alongside or outside of the state court system.¹⁶ There are over 6,500 municipal courts operating across the country.¹⁷ Many states have enacted laws that impose fees uniformly in particular types of cases.¹⁸ States with municipal courts, however, often give discretion to assess fees to the local legislative body or court.¹⁹ Even states without municipal courts often give local government, courts, probation departments or prosecutors discretion

¹³ FLA. STAT. §§ 806.13(1), 775.082(4)(b), 775.083(e) (2020).

¹⁴ FLA. STAT. § 893.135(c)(2)(d) (2020).

¹⁵ Menendez et al., *supra* note 10, at 6; *see also Help for Crime Victims*, NATIONAL CENTER FOR VICTIMS OF CRIME <https://victimsofcrime.org/criminal-and-civil-justice/> (last visited Sep. 26, 2020). Every jurisdiction in the U.S. also authorizes judges to order restitution in criminal cases where there is a victim of the crime who has suffered economic loss, and in approximately one-third of the states, restitution is required. This article is not addressing victim restitution. However, many jurisdictions also impose a restitution fee, in addition to actual restitution. Those fees are encompassed in this article’s definition of fees.

¹⁶ For example, in New York state, there are over 1300 Justice Courts which exercise jurisdiction over petty offenses such as traffic and municipal code violations, as well as misdemeanors. *See* N.Y. UNIFORM JUST. CT. ACT § 101; N.Y. CRIM. PROC. LAW § 10.30.

¹⁷ *Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees*, U.S. DEP’T OF JUST. 2 (2016), <https://ojp.gov/docs/finesfeesresguide.pdf>.

¹⁸ *See e.g.*, NEV. REV. STAT. §§ 697.300, 176.059, 176.0623, 201.356, 176.0613, 176.062, 176.0915, 176.09187, 176.139, 174.032, 211.130, 209.4295 (2020).

¹⁹ *See, e.g.*, MO. REV. STAT. §§ 559.604, 559.607.

to impose a variety of fees for costs that the local government incurs such as for probation, diversion programs, or jail.²⁰

Fees are assessed at every step of a person's journey through the criminal legal system. Although it varies by jurisdiction, fees can be imposed before a person is even arrested (warrant fees), and then through arrest (booking and bond fees), conviction (prosecution, public defender, DNA, and court security fees), a term of custody (phone call, room and board, video visitation, and medical fees) or probation (probation and drug testing fees).²¹

In 2016, Leann Banderman pled guilty to stealing \$24.29 worth of nail polish from a Walmart in Dent County, Missouri. The judge sentenced her to thirty days in the county jail. After she was released, the court sent Ms. Banderman a bill for \$1,400—the cost of her thirty days in jail.²²

Many of these fees are imposed even if charges are ultimately dismissed or the person is acquitted. To cite just one example, in Iowa, despite the dismissal of all charges pending against her, Lori Dee Mathes was charged a \$100 filing fee, \$40 court reporter fee, and a \$2,847.28 indigent defense reimbursement fee.²³

Fees are also imposed for programs that have nothing to do with the courts or the legal system. New Jersey, for example, assesses a fee on all traffic tickets to fund autism research.²⁴ Arizona funds statewide elections

²⁰ See, e.g., CAL. PENAL CODE §1201.3(b); Lauren Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CENTER FOR JUSTICE (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate>.

²¹ See Alexis Harris, *A POUND OF FLESH, MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* 1, 26-48 (Lee Clarke et al. eds., 2016); Beth A. Colgan, *Fines, Fees, And Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST. LAW & SOC'Y 22, 23 (2017).

²² *Messenger: Missouri courts respond to debtors prison ruling – a tale of two judges*, ST. LOUIS POST-DISPATCH (April 7, 2019), https://www.stltoday.com/news/local/columns/tony-messenger/messenger-missouri-courts-respond-to-debtors-prison-ruling-a-tale/article_6d87b1fd-efb6-53ce-84b9-02dc5d2f4d5a.htm; Tony Messenger (@tonymess), TWITTER (Apr. 2, 2019, 2:47 PM) <https://twitter.com/tonymess/status/1113150955787354113>.

²³ Lee Rood, *Critics say bill touted as reforming court fines and fees would be a civil rights setback*, THE HAWK EYE (June 28, 2020), <https://www.thehawkeye.com/story/news/local/2020/06/28/critics-say-bill-touted-as-reforming-court-fines-and-fees-would-be-civil-rights-setback/1127652441>; see *State v. Mathes*, No. 17-1909, 2019 WL 1294098 (N.W.2d Mar. 20, 2019) *aff'd* No. 17-1909, 2020 WL 2267274 (Iowa May 8, 2020).

²⁴ Laura Herzog, *We Paid \$405M in tickets last year; see where the money went*, NJ.COM (Jan. 16, 2019), https://www.nj.com/news/2016/05/where_your_ticket_payment_money_goes_funds_new_jer.html.

through a surcharge imposed on all civil and criminal fines and penalties.²⁵ California provides a particularly egregious example. The fine for a red-light violation is \$100. But that \$100 fine carries with it \$390 in additional fees. The state assesses a \$40 court operations fees; a \$35 criminal conviction fee; a \$4 emergency medical air transportation penalty; a \$1 night court fee; and, a \$310 penalty assessment and surcharge.²⁶ The latter fee funds eight different state programs, including the Fish and Game Preservation Fund, the Office of Emergency Services, and the Traumatic Brain Injury Fund.²⁷

New York state has abandoned even the pretext of tying fees to the justice system or to any particular government program. The state assesses a surcharge on all traffic, misdemeanor, and felony convictions: \$300 for felony convictions, \$175 for misdemeanor convictions, and \$95 for traffic and other violations.²⁸ The money goes directly to the state general fund. These “fees” are simply taxes imposed only on people who are involved in the criminal legal system. Like any flat tax, they are regressive, impacting low-income people much more than middle or upper-income people.

All of these types of fees have become enormously popular as a revenue-raising device. Since 2010, the majority of U.S. states have increased the number or amount of fines and fees imposed upon people who are justice-system involved.²⁹ The dramatic escalation in fines and fees occurred in large part as a result of mass incarceration. There are roughly 2.3 million people incarcerated in prisons and jails.³⁰ But that is merely a snapshot of a single day. Approximately 10.6 million people cycle through local jails in the United States each year.³¹

²⁵ ARIZ. REV. STAT. ANN. §16-954(A) (2020).

²⁶ See *Penalty Assessment Funds*, CALIFORNIA STATE AUDITOR 5, 7 (Apr. 2018), <https://www.auditor.ca.gov/pdfs/reports/2017-126.pdf>.

²⁷ *Id.* at 5.

²⁸ *New York Should Re-Examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations*, FINES AND FEES JUSTICE CENTER (Nov. 20, 2018), <https://finesandfeesjusticecenter.org/articles/new-york-should-re-examine-mandatory-court-fees-imposed-on-individuals-convicted-of-criminal-offenses-and-violations/>.

²⁹ See, e.g., Alicia Bannon et al., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf (describing forms of debt and collateral consequences in the fifteen states with the highest prison populations); see *In for a Penny: The Rise of America's New Debtors*, ACLU 5, 8 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf.

³⁰ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

³¹ *Id.*

The United States incarcerates more people than any other country in the world.³² With less than five percent of the world's population, the U.S. accounts for almost twenty-five percent of the world's prison population.³³ The United States incarcerates 716 people for every 100,000 residents.³⁴ More than half the countries and territories in the world have incarceration rates of less than 150 per 100,000.³⁵ To make the comparison differently, the state of Maryland, with a population of 5.9 million, has more people in prison than Iraq, which is home to 33.7 million people; Ohio – with a population of 11.6 million people – has more people in prison than Pakistan, which is home to 194.6 million people.³⁶ The United States' incarceration rate is not only high, it is historically high. In the past forty years, the rate of incarceration in the U.S. increased by 500%.³⁷

The dramatic increase in incarceration rates resulted in a commensurate increase in costs. From 1979–80 to 2012–13, state spending on corrections in the United States ballooned from seventeen to seventy-one billion dollars.³⁸ But corrections costs—the cost of prisons and parole—comprise just a fraction of the cost of the criminal legal system.³⁹ As states incarcerated more and more people, other costs also increased: states needed more prosecutors and public defenders, more judges and court staff, more court rooms, more probation officers, and more police.⁴⁰ At the same time, a “no new taxes” movement swept the country.⁴¹ Legislators were increasingly reluctant to raise taxes to fund

³² *Fact Sheet: Trends in U.S. Corrections*, THE SENTENCING PROJECT 2 (Aug. 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>.

³³ *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Sept. 26, 2020).

³⁴ Roy Walmsley, *World Prison Population List*, INTERNATIONAL CENTRE FOR PRISON STUDIES 10TH ED 1 (2013), https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_10.pdf.

³⁵ *Id.*

³⁶ See Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>; Walmsley, *supra* note 34.

³⁷ *Fact Sheet: Trends in U.S. Corrections*, *supra* note 32, at 2.

³⁸ Stephanie Stullich et al., STATE & LOCAL EXPENDITURES ON CORRECTIONS & EDUCATION: A BRIEF FROM THE U.S. DEP'T OF EDUC., POL'Y & PROGRAM STUD. SERV. 1 (U.S. Dep't. of Educ. 2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>.

³⁹ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

⁴⁰ *Id.*

⁴¹ See Peter Ferrara, *Grover Norquist's Taxation Liberation Movement*, THE AMERICAN SPECTATOR (June 17, 2015 12:00 AM), <https://spectator.org/grover-norquists-taxation-liberation-movement/>.

government and sought alternative revenue streams. As Pennsylvania State Representative Tim Briggs acknowledged, “[U]nfortunately, in a climate where we don’t want to raise taxes, fees become the substitute of taxes.”⁴²

Those “user fees” – fees imposed on people who use a particular government service for the cost of that service – proliferated, particularly in the criminal legal system.⁴³ Pennsylvania State Senator Lisa Baker, chair of the Senate Judiciary Committee, explained to an investigative reporter that there are two reasons the state has repeatedly added costs and surcharges to the justice system. First, people believe that those who violate the law should pay at least some of the costs of running the criminal legal system; and, second, law makers want to raise revenue without raising taxes. “This is one of many nontraditional means that have drawn support in enabling our state to provide necessary services and meet public expectations.”⁴⁴

Over time, and especially after the Great Recession swept through the public sector beginning in 2008, legislators became addicted to raising revenue through the criminal legal system.⁴⁵ Although one may question the wisdom of and motivation for raising revenue from people who have no money,⁴⁶ that is precisely what this regime has wrought.

III. THE IMPLICATIONS FOR RACE AND POVERTY

Racial and economic disparities pervade the criminal legal system in the United States. People who are justice-system involved are overwhelmingly poor and disproportionately people of color. Those two factors—race and poverty—combine to create a system of monetary

⁴² Rihl, *supra* note 5; Juliette Rihl, *\$206 or Jail: A 15-Year-Old Traffic Fine Leads to a Painful Choice*, THE CRIME REPORT (Feb. 7, 2020), <https://thecrimereport.org/2020/02/07/206-or-jail-a-15-year-old-traffic-fine-leaves-a-painful-choice/> (“Revenue from fines and fees funds multiple levels of government, due in large part to lawmakers imposing court fees as an alternative to raising taxes”).

⁴³ Bannon et al., *supra* note 29, at 1.

⁴⁴ Rihl, *supra* note 5.

⁴⁵ See generally Bannon, *supra* note 29, at 7; Rebekah Diller, *The Hidden Cost of Florida’s Criminal Justice Fees*, BRENNAN CENTER FOR JUSTICE 14, 21 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida’s-Criminal-Justice-Fees.pdf.

⁴⁶ See generally Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that, with respect to the war on drugs, federal, state and local policies are purposefully racist, creating a caste-like system that has resulted in the mass incarceration of minorities). This article does not address the motivation for the criminalization of poverty through fines and fees nor its disproportionate impact on communities of color.

sanctions that attempt to extract millions of dollars from the country's most vulnerable communities. Fines and fees perpetuate and exacerbate poverty, and they keep communities of color from accumulating wealth.

Mass incarceration is not experienced by all Americans equally. According to the Sentencing Project, sixty-seven percent of the prison population is comprised of people of color; yet people of color comprise only thirty-seven percent of the U.S. population.⁴⁷ More significantly, with respect to fines and fees, the Stanford Open Policing Project found that Black men are more likely to be arrested than White men.⁴⁸ If they are arrested, Black men are more likely to be convicted of a crime than White men, and if they are convicted, they are likely to be sentenced more harshly than White men.⁴⁹ The likelihood of incarceration of Black men is six times that of White men, and the likelihood of incarceration of Hispanic men is more than twice that of non-Hispanic White men.⁵⁰

These racial disparities are not confined to people in custody in prison or jail or to people accused of violent or serious crime. To the contrary, they pervade the criminal legal system beginning with the most mundane of policing practices. Racial disparities in traffic stops are large and ubiquitous across the nation.⁵¹ A United States Department of Justice report revealed that, in 2011, Black drivers were thirty-one percent more likely to be stopped by law enforcement than White drivers.⁵² More recently, the Stanford Open Policing Project examined approximately ninety-three million traffic stops conducted from 2011 to 2017 across twenty-one state patrol agencies and twenty-nine municipal police

⁴⁷ *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Sep. 22, 2020); see also Ashley Nellis, *The Color of Justice: Racial & Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT 4 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

⁴⁸ *Findings*, THE STANFORD OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings/> (last visited Dec. 4, 2019).

⁴⁹ *Id.*; Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, NATURE HUM. BEHAV. (May 2020), <https://www.nature.com/articles/s41562-020-0858-1.pdf>; *The Color of Justice: Racial & Ethnic Disparity in State Prisons*, *supra* note 47.

⁵⁰ *Id.*

⁵¹ Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 DUKE F. FOR L. & SOC. CHANGE 21, 22 (2017).

⁵² Christopher Ingraham, *You really can get pulled over for driving while black, federal statistics show*, WASH. POST (Sept. 9, 2014, 2:44 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-Black-federal-statistics-show/>; see also Lynn Langton and Matthew Durose, U.S. DEP'T OF JUST. OFFICE OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS (2013).

departments. The study concluded that Black drivers are twenty percent more likely to be stopped by law enforcement than White drivers.⁵³

People of color are not only more likely to be subjected to traffic stops by law enforcement than White drivers, but they are more likely to be given a ticket and to receive multiple tickets than White drivers.⁵⁴ For example, the Department of Justice found that when stopped for speeding, Black drivers are twenty percent more likely to get a ticket than White drivers, and Latinx drivers are thirty percent more likely than White drivers to be ticketed.⁵⁵

The U.S. Justice Department's investigation of the Ferguson, Missouri police department provides a concrete example. In 2013, more than fifty percent of Black drivers ticketed by police received multiple citations during a single police encounter; but only twenty-six percent of non-Black drivers received more than one citation in a single stop. As the number of citations issued increased beyond two, the racial disparities were even more pronounced.⁵⁶ Finally, the disparity in speeding tickets between Black individuals and non-Black individuals "is [forty-eight percent] larger when citations are issued not on the basis of radar or laser, but by some other method, such as the officer own visual assessment."⁵⁷

Other investigations throughout the United States document similar findings. Between 2009 and 2011, seven in ten people arrested for traffic offenses in Washington D.C. were Black, despite 43.6 percent of the population being White.⁵⁸ In Nebraska, four percent of the population is Black, but comprised nearly eight percent of the people subjected to a traffic stop.⁵⁹ In 2018, Black drivers were arrested incident to those traffic stops 18.2 percent of the time, compared with just 4.6 percent for the general population.⁶⁰ A 2016 review of traffic stops in Bloomfield, New Jersey revealed that although the city is about sixty percent White,

⁵³ AJ Willingham, *Researchers studied nearly 100 million traffic stops and found black motorists are more likely to be pulled over*, CNN (Mar. 21, 2019), <https://www.cnn.com/2019/03/21/us/police-stops-race-stanford-study-trnd/index.html>; see generally Pierson et al., *supra* note 49.

⁵⁴ See *Investigation of the Ferguson Police Department*, *supra* note 6, at 66.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 66–67.

⁵⁸ *Demographics of Washington, D.C.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Demographics_of_Washington,_D.C.

⁵⁹ Darrell Fisher et al., 2019 TRAFFIC STOPS IN NEBRASKA: A REPORT TO THE GOVERNOR AND THE LEGISLATURE ON DATA SUBMITTED BY LAW ENFORCEMENT (Mar. 27, 2020), https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/doc/Traffic_Stops_in_Nebraska_2019_FINAL.pdf.

⁶⁰ *Id.*

seventy-eight percent of ticketed motorists were Black or Latinx.⁶¹ An Oregon analysis of twelve police departments found disparate outcomes (i.e., citation, search, and/or arrest) for Latinx individuals.⁶² A 2014–2015 report issued by the Tucson Police Department found that although Black drivers only represented 4.9 percent of the city’s residents, they received 6.5 percent of all traffic citations.⁶³ Other minority drivers, including Latinx drivers “received traffic tickets at a rate slightly less than the percentage of each ethnicity’s population in Tucson.”⁶⁴

Not only are people who encounter the criminal legal system in the United States disproportionately people of color, they are also disproportionately poor. Although the poverty rate in the United States today hovers at around 10.5%,⁶⁵ roughly 90% of people charged with felonies and misdemeanors qualify for the services of a public defender,⁶⁶ which requires that a judge find the defendant to be indigent.⁶⁷ Nearly half of the people jailed in the United States have individual incomes below \$10,000 per year.⁶⁸

Thus, poverty and race combine to create a system where poor people of color are most likely to be assessed monetary sanctions they cannot afford. Indeed, the effect of race and poverty is synergistic. The racial disparities in the criminal legal system are compounded by the demographics of poverty in the U.S. The majority of poor people in the

⁶¹ Mark Denbeaux et al., RACIAL PROFILING REPORT: BLOOMFIELD POLICE AND BLOOMFIELD MUNICIPAL COURT 2, 4 (Apr. 7, 2016), <http://dx.doi.org/10.2139/ssrn.2760382>.

⁶² OREGON CRIM. JUST. COMM’N, STAT. TRANSPARENCY OF POLICING REPORT 20 (Nov. 25, 2019), https://www.oregon.gov/cjc/CJC%20Document%20Library/STOP_Report_Final.pdf.

⁶³ Amanda Le Claire, *Police Ticket Disproportionate Number of Blacks in Tucson*, ARIZONA PUBLIC MEDIA (July 30, 2015, 5:07 PM), <https://www.azpm.org/s/32764-tpd-releases-report-on-traffic-citations-and-race/>.

⁶⁴ *Id.*

⁶⁵ *What is the current poverty rate in the United States?*, CTR. FOR POVERTY RSCH., <https://poverty.ucdavis.edu/faq/what-current-poverty-rate-united-states> (last updated Sept. 15, 2020).

⁶⁶ Oliver Laughland, *The human toll of America’s public defender crisis*, THE GUARDIAN (Sept. 7, 2016), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system>.

⁶⁷ *Frequently asked question: Who is entitled to a free lawyer?*, ABA, https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ (last visited Sept. 27, 2020).

⁶⁸ Slexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POLICY INITIATIVE (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

U.S. are people of color.⁶⁹ Black individuals are three times as likely, and Latinx individuals are twice as likely, to experience poverty than White individuals.⁷⁰ In 2016, roughly 13.4 percent of the U.S. population was Black, but twenty-two percent of Black individuals lived in poverty. By contrast, approximately nine percent of White individuals lived in poverty, but White individuals comprised 76.3 percent of the U.S. population.⁷¹ Further, Black and Latinx families are less likely than White families to have significant wealth and other assets, and they are disproportionately more likely to be in debt.⁷² Indeed, “in spite of laws guaranteeing civil rights, the most salient feature of American poverty remains race.”⁷³ Thus, the people in the American criminal legal system are largely poor people of color. They are the people legislators insist pay fines and fees, and they are the least likely to be able to afford them.

Buffalo, New York provides a compelling example of how these phenomena – legislators turning to the criminal legal system to raise money and a criminal legal system comprised largely of low-income people of color – converge and are inextricably linked.⁷⁴ In 2019, *The Investigative Post of Buffalo* reported that traffic stops in Buffalo were used to generate revenue and principally targeted people of color.⁷⁵ After the City of Buffalo entered into an arrangement with the State that allowed it to retain most of the money generated by traffic tickets issued by the Buffalo police, both the issuance of tickets and revenue collected from them soared from \$500,000 the year before the new system was

⁶⁹ See *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND., <http://kff.org/other/state-incator/poverty-rate-by-raceethnicity/?Timeframe=0> (last visited Sept. 27, 2020).

⁷⁰ *The Doorways Dish*, DOORWAYS FOR WOMEN AND FAMILY, <https://myemail.constantcontact.com/Let-s-talk-about-poverty-and-race.html?soid=1102452077294&aid=AtLAyFKnGvM> (last visited Nov. 25, 2019).

⁷¹ Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INSTITUTE 10 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>; *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI225218> (last visited Dec. 23, 2019).

⁷² Danyelle Solomon & Darrick Hamilton, *The Coronavirus Pandemic and the Racial Wealth Gap*, CENTER FOR AMERICAN PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/issues/race/news/2020/03/19/481962/coronavirus-pandemic-racial-wealth-gap/>; see SHRIVER CENTER ON POVERTY LAW, <https://www.povertylaw.org/clearinghouse/articles/answers> (last visited Nov. 25, 2019); see generally Peter Edelman, *NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA* (The New Press 2017).

⁷³ Solomon & Hamilton, *supra* note 72.

⁷⁴ See generally Marsha McLeod, *City Hall cashing in on traffic tickets*, INVESTIGATIVE POST (Feb. 27, 2019), <http://www.investigativepost.org/2019/02/27/city-hall-cashing-in-on-traffic-tickets/>.

⁷⁵ See *id.*

implemented to more than \$2.8 million in fiscal year 2017, two years later.⁷⁶ Despite the over \$2 million in increased fine and fee revenue, the City imposed thirteen new fees that totaled at least an additional \$100 in every traffic case.⁷⁷ *The Post* investigation uncovered that Black and Latinx neighborhoods were targeted for traffic enforcement, principally through the use of checkpoints.⁷⁸ Between 2013 and 2017, “85 percent of checkpoints were done in Black and Latin[x] neighborhoods.”⁷⁹ As one Buffalo resident observed, “Every time I go to City Hall or the DMV to pay tickets, it’s a wall of black and brown people”⁸⁰

IV. THE CONSEQUENCES OF NONPAYMENT

Despite the fact that the people being assessed fines and fees often do not have the ability to pay them, they face a variety of additional sanctions when they cannot immediately satisfy their court debt in full. The amounts they owe often increase; their driver’s license may be suspended; they may be jailed; they may lose their voting rights. These collateral consequences lead to a cycle of poverty and punishment and the criminalization of poverty. Traffic tickets and other low-level violations are often the entry point into the criminal legal system, but harsh enforcement practices are the trap that keep people in the system indefinitely.

The first thing that happens to a person who cannot afford to pay their fines and fees is that the amount they owed increases. In many jurisdictions, traffic fines double if they are not paid within thirty or sixty days, or another financial penalty is imposed.⁸¹ In addition, interest is often assessed. Until 2019, Washington state imposed twelve percent interest on all delinquent fines and fees⁸². Florida assesses a late payment fee and

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (“Black and Latino drivers, whose neighborhoods have been targeted for traffic enforcement, appear to be hit the hardest, both in fines and loss of licenses”).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ In Chicago, for example, the cost of a citation for not having a city parking sticker is \$200; with late penalties and collection fees, the price can rise to \$488. Melissa Sanchez & Elliot Ramos, *Chicago Hiked the Cost of Vehicle City Sticker Violations to Boost Revenue*, PROPUBLICA ILLINOIS (July 26, 2018, 6:00 AM), <https://www.propublica.org/article/chicago-vehicle-sticker-law-ticket-price-hike-black-drivers-debt>. In Buffalo, New York, the City’s Traffic Violations Bureau, which does not allow partial payments charges late fees for tickets paid after the due date, charges \$50 after 30 days; after 60 days an additional \$60; and after 90 days, an additional \$90. BUFFALO TRAFFIC VIOLATIONS AGENCY, <https://www.buffalony.gov/Faq.aspx?QID=117> (last visited Sept. 27, 2020).

⁸² Harris, *supra* note 21, at 40-41.

mandates that fines and fees that remain uncollected after ninety days be sent to private collection agencies that are permitted to charge up to forty percent of the debt owed.⁸³

In addition to increasing fine amounts if payment is not immediate, in many state and local jurisdictions, collection costs are imposed. Alabama charges five dollars per month for every payment made pursuant to a payment plan.⁸⁴ California allows courts to charge up to \$300 as a “civil assessment fee” if a payment is late and up to thirty five dollars to establish a payment plan.⁸⁵ Buffalo, charges a fifteen dollar deferral fee if you don’t pay immediately, and ten dollars for each subsequent deferral.⁸⁶ In Buffalo, payment plans are not permitted.⁸⁷ The jurisdiction demands the money in one payment within a fixed amount of time, requiring that you make a court appearance multiple times until you pay in full.

Some jurisdictions outsource collections either to private collection agencies or to what is known as private probation—for profit companies that supervise payment plans. Traditionally, probation is ordered in lieu of a potential jail sentence.⁸⁸ If the probationer meets regularly with their probation officer and complies with any other court-ordered conditions of probation for a fixed period of time, they escape a term of custody that the court would otherwise impose. In some jurisdictions, probationers are charged fees to help defray the cost of probation, resulting in probation fees.⁸⁹ Los Angeles County, for example, charges \$155 per month for probation supervision.⁹⁰ But some courts have turned probation into a debt collection tool, sentencing someone to probation only because they need time to pay off their fines and fees. Known as “pay-only” probation, these schemes often further entrench people in the justice system.⁹¹ The probation companies offer courts, counties, and municipalities a great deal: they provide probation services at no cost to the jurisdiction. Instead,

⁸³ Diller, *supra* note 45, at 21.

⁸⁴ *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama’s racial wealth divide*, ALABAMA APPLESEED CENTER FOR LAW & JUSTICE <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

⁸⁵ CAL. PENAL CODE § 1214.1 (2015); CAL. VEH. CODE §40510.5(g) (1959).

⁸⁶ BUFFALO TRAFFIC VIOLATIONS AGENCY, *supra* note 81.

⁸⁷ *See, e.g., id.*

⁸⁸ *Profiting From Probation: America’s Offender-Funded Probation Industry*, HUMAN RIGHTS WATCH 2 (Feb. 2014) [hereinafter *Profiting From Probation*], https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

⁸⁹ *Id.*

⁹⁰ Memorandum from Sachi Hama, Chief Exec. Off., County of Los Angeles to Los Angeles County Board of Supervisors, at 50 (Dec. 13, 2019), *Report Back on Addressing Fines and Fees Associated with Criminal Justice System Involvement (Item No. 10, Agenda of April 16, 2019)* (on file with the author).

⁹¹ *Profiting From Probation*, *supra* note 88, at 3.

they collect fees from the probationers they supervise.⁹² As Human Rights Watch reported in 2014, “[p]ay-only probation is an extremely muscular form of debt collection masquerading as probation supervision, with all costs billed to the debtor.”⁹³

People who are on pay-only probation are forced to pay an additional monthly “probation fee” that can range from \$35 to \$100 per month, and typically any money that the individual pays is credited first to the probation fee and then to the person’s remaining court debt.⁹⁴ People can remain on pay-only probation for years and can end up paying as much, if not more in probation fees than they originally owed in court debt.⁹⁵ In Mississippi, offenders are often sentenced to pay-only probation for twenty-four months in order to pay fines and fees totaling roughly \$1,000.⁹⁶ After paying the forty dollar monthly probation fee charged in Mississippi, they would owe an additional \$960 in supervision fees, almost doubling the original fine.⁹⁷ The conflict of interest inherent in this system is obvious: the longer it takes a person to pay off their debts, the longer they remain on probation and the more they pay in supervision fees to the private probation company. In other words, the more impoverished a person is, the more they ultimately pay and the longer they have to live with the threat of possible incarceration. In 2014, Human Rights Watch estimated that in Georgia alone, probation companies took in at least forty million in revenues from fees they charge to probationers.⁹⁸

Pay-only probation companies have also engaged in often illegal and unconstitutional practices to collect. In numerous reports, researchers have documented probation company personnel and court officials, including judges, threatening to revoke probation and incarcerate people who do not make their payments.⁹⁹ As discussed more fully below, incarcerating a person who does not have the ability to pay their court debt is unconstitutional. Moreover, pay-only probation is used for offenders who would not be on probation at all if they had more money. They pose no threat to public safety and require no supervision. Many are guilty of offenses that carry no possibility of jail time as a sanction for the underlying offense, such as speeding, driving without proof of insurance, or failing to properly maintain a driveway.¹⁰⁰

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 24.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 4.

⁹⁹ *Id.* at 1-2, 25.

¹⁰⁰ *Id.* at 1.

For example, in 2015, Adel Edwards, a plaintiff in a class action brought by the Southern Center for Human Rights pleaded guilty to burning leaves in his yard without a permit.¹⁰¹ Mr. Edwards, who is intellectually disabled and whose only income was from food stamps, was placed on probation by the Pelham, Georgia Municipal Court for twelve months because he could not pay his \$500 fine and fees on the day he appeared in court.¹⁰² With probation “supervision” costs added in, his court bill rose to \$1,028.¹⁰³ Immediately after his court hearing, a Red Hills probation officer demanded a payment that neither Mr. Edwards nor his family could afford to pay.¹⁰⁴ Mr. Edwards was taken to jail and held for several days until a friend paid \$250 to get him released.¹⁰⁵ Even after Mr. Edwards’s probation was terminated, private probation officers ordered him to continue reporting and threatened to incarcerate him if he failed to report and pay as ordered.¹⁰⁶

Private probation companies are not the only way that people are threatened with and actually incarcerated because they cannot afford to pay fines and fees. The Department of Justice Investigation of the Ferguson Police Department included a section on the Ferguson Municipal Court and documented numerous instances of the judge incarcerating people who could not pay their fines and fees.¹⁰⁷ That phenomenon—the resurgence of debtor’s prisons—was not just a Ferguson problem or even a problem in just Missouri. In Washington, Alabama, Mississippi, Arkansas, Ohio, Georgia, Michigan, Tennessee, and Colorado, people were going to jail simply because they were too poor to pay exorbitant fines and fees—and those are just the states where there was litigation challenging debtor’s prisons.¹⁰⁸

Incarceration may result indirectly, as well. If a person cannot afford immediately to pay their court debt, they may be required to return

¹⁰¹ Complaint at 3-4, *Edwards v. Red Hills Cmty. Prob.*, No. 1:15-CV-0067 (M.D. Ga. May 1, 2016).

¹⁰² *Id.* at 3-4, 23.

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.*

¹⁰⁷ See *Investigation of the Ferguson Police Department*, *supra* note 6, at 3.

¹⁰⁸ See e.g. *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 3:15-CV-01048 (M.D. Tenn. February 5, 2020); *Cooks v. Taylor*, No. 5:17-CV-00774 (W.D. Okla. September 18, 2017); *Foster v. City of Alexander City*, No. 3:15-CV-00647 (M.D. Ala. August 4, 2017); *Jenkins v. City of Jennings*, No. 4:15-CV-00252 (E.D. Mo. July 24, 2017); *Kennedy v. City of Biloxi*, No. 1:15-CV-00348 (S.D. Miss. September 13, 2016); *Howard v. City and County of Denver*, No. 1:11CV02797 (D. Colo. September 3, 2013); *Mahoney v. Derrick*, No. 60CV-18-5616, 2018 WL 3768088 (Ark. Cir. Ct. August 9, 2018); *Fuentes v. Benton County*, No. 15-2-02976-1 (Wa. Super. Ct. October 7, 2015).

repeatedly to court until the full debt is paid. If a person does not appear at a scheduled court hearing, perhaps because they could not take time off from work, could not arrange childcare, did not have transportation, or were ill, the judge may issue a warrant for the person's arrest.

There is a second chapter to the story of Leann Banderman, the Missouri woman who stole nail polish and was charged \$1400 for her thirty day jail sentence.¹⁰⁹ Ms. Banderman could not afford to pay the "board bill" for her jail time, resulting in the judge jailing her again.¹¹⁰ She received another bill for an additional \$2,160 resulting from that stay.¹¹¹ Last year, a Missouri Court of Appeals finally ruled the practice was not authorized by state law and had to stop.¹¹² Missouri law allows counties to charge "board fees", but they cannot threaten people with jail or actually incarcerate them simply because they are poor and cannot pay the bill.¹¹³ Based on the number of cases filed alleging that jurisdictions were operating debtor's prisons and the number of media reports on the resurgence of debtor's prisons for unpaid fines and fees, courts seem to have forgotten this basic constitutional rule.¹¹⁴

Even in jurisdictions that do not incarcerate people for failure to pay their court debt, there are other collection practices that exacerbate and criminalize poverty. The most common is driver's license suspensions. Forty-one states and the District of Columbia will suspend, revoke or not allow a person to renew their driver's license if they have unpaid fines and fees.¹¹⁵ In the U.S. today, there are at least eleven million driver's license suspensions for unpaid court debt.¹¹⁶

The consequences of license suspensions can be catastrophic. People depend on their driver's licenses to get to work, to get themselves or their

¹⁰⁹ See Messenger, *supra* note 22.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See State v. Richey, 569 S.W.3d 420, 425 (Mo. 2019).

¹¹³ *Id.* at 425.

¹¹⁴ See Brett Story & Todd Chandler, *A Debtor's Prison: Debilitating Cycles of Incarceration in the U.S.*, AEON VIDEO & ARTICLE (Mar. 27, 2018), <https://finesandfeesjusticecenter.org/articles/debtors-prison-court-fees/>; "Set Up to Fail": *The Impact of Offender-Funded Private Probation on the Poor*, FEES AND FINES JUSTICE CENTER (Feb. 1, 2018), <https://finesandfeesjusticecenter.org/articles/set-up-to-fail-the-impact-of-offender-funded-private-probation-on-the-poor/>.

¹¹⁵ *Free to Drive maps: suspension statutes, data, narratives, and more*, FREE TO DRIVE, <https://www.freetodrive.org/maps/#page-content> (last visited Sep. 18, 2020).

¹¹⁶ See *id.* (That number is likely a gross underestimate because there is no national standard for data collection related to license suspensions, and states track and report driver's license suspension data in very different ways). See also Mario Salas & Angela Ciolfi, *Driven by Dollars: A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, LEGAL AID JUST. CTR. (Fall 2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>.

families to the doctor, or their children to school. People need to drive to buy groceries, attend church, or make a court appearance. In most parts of the country, and especially in rural communities, public transportation options are limited or non-existent. Indeed, when eighty-three percent of Americans report driving a car multiple times a week, driver's license suspensions make life almost impossible.¹¹⁷

Suspensions often result in severe economic loss. Over seventy-six percent of Americans drive to work,¹¹⁸ and thirty percent of jobs require driving as part of the job.¹¹⁹ In one New Jersey study, forty-two percent of people who lost their driver's license lost their job.¹²⁰ When people lose their jobs, they and their families suffer. They can lose their homes, go hungry, or go without medicine. Similarly, roughly half of school-aged children are driven to school.¹²¹ Without a parent to drive them, children skip school or are late because of inadequate alternatives. When transportation is a barrier, patients often do not seek medical care, miss appointments, or delay care until their health deteriorates and then require emergency treatment.¹²²

It is not surprising, then, that most people whose licenses are suspended drive anyway.¹²³ Driving on a suspended license is a misdemeanor almost everywhere in the U.S. If a person drives with a suspended license and is stopped by law enforcement, they can be cited or arrested. If convicted, they face additional fines and fees and possibly jail.

In 2002, Demetrice Moore, a certified nursing assistant (CNA) and mother of two children, was convicted of grand larceny and sentenced to

¹¹⁷ Megan Brenan, *83% of U.S. Adults Drive Frequently; Fewer Enjoy It a Lot*, GALLUP (July 9, 2018), <https://news.gallup.com/poll/236813/adults-drive-frequently-fewer-enjoy-lot.aspx>.

¹¹⁸ Adie Tomer, *America's Commuting Choices: 5 Major Takeaways from 2016 Census Data*, BROOKINGS (Oct. 3, 2017), <https://www.brookings.edu/blog/the-avenue/2017/10/03/americans-commuting-choices-5-major-takeaways-from-2016-census-data/>.

¹¹⁹ *30 Percent of Civilian Jobs Require Some Driving in 2016*, U.S. BUREAU OF LABOR STAT.: THE ECONOMICS DAILY (June 27, 2017), https://www.bls.gov/opub/ted/2017/30-percent-of-civilian-jobs-require-some-driving-in-2016.htm?view_full.

¹²⁰ Jon A. Carnegie, *DRIVER'S LICENSE SUSPENSIONS, IMPACTS AND FAIRNESS STUDY 56* (2007), <https://www.nj.gov/transportation/business/research/reports/FHWA-NJ-2007-020-V1.pdf>.

¹²¹ Noreen McDonald & Annette Aalborg, *Why Parents Drive Children to School: Implications for Safe Routes to School Programs*, 75 J. AM. PLAN. ASS'N, VOL. 331 (2009).

¹²² Jeff Hobson & Julie Quiroz-Martinez, *ROADBLOCKS TO HEALTH: TRANSPORTATION BARRIERS TO HEALTHY COMMUNITIES I* (2002), https://www.transformca.org/sites/default/files/roadblocks_to_health_2002.pdf.

¹²³ Suspended/Revoked Working Group, *Best Practices Guide to Reducing Suspended Drivers*, AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS 4-5 (Feb. 2013), <http://www.aamva.org/Suspended-and-Revoked-Drivers-Working-Group/>

jail and to pay fees.¹²⁴ She served her jail time, but was unable to pay the fees she owed, which resulted in the automatic suspension of her Virginia driver's license.¹²⁵ Her work as a CNA required that she drive to the homes of her patients.¹²⁶ As a result, she was convicted several times for driving on a suspended license and spent twenty-three days in jail in 2016 and then gave up her job because it required driving.¹²⁷ Her court debt from her multiple convictions and accumulated interest totaled almost \$4500, an amount she simply cannot afford to pay.¹²⁸ She has been without her license for over a decade and stuck in the system for over 15 years.¹²⁹

Driver's license suspensions also impact re-entry, making it much more difficult for a person returning to their community from a period of incarceration to succeed. ABC News reported about Matt Holland, a formerly incarcerated person who works nights at a Denny's in Florida and earns eleven dollars an hour.¹³⁰ His wife has to pick him up at the end of his shift at 1:00 a.m. because his driver's license was suspended for unpaid traffic and criminal fines and fees.¹³¹ His two school-aged children have to go with her.¹³² Holland would much rather have kept his old job as a plumber, where he was making sixteen dollars an hour, but that would have required him to drive.¹³³

In most states, to get one's driver's license reinstated requires paying off all of the court debt owed and paying even more fees.¹³⁴ In New York, the fee for termination of indefinite suspensions is seventy dollars per suspension (raised from thirty-five dollars in 2009).¹³⁵ There can be multiple simultaneous suspensions (one per ticket); indeed, the Department of Motor Vehicles site advises: "[y]ou can pay up to [ten] suspension termination fees in one day."¹³⁶ That would be \$700.

Like everything else in the criminal legal system in the U.S., driver's license suspensions are strongly correlated with race. In New York City,

¹²⁴ Salas & Ciolfi, *supra* note 116, at 3.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Meghan Keneally, 'It's Not America': 11 Million Go Without a License Because of Unpaid Fines, ABC NEWS (Oct. 25, 2019), <https://abcnews.go.com/US/vicious-cycle-11-million-live-drivers-license-unpaid/story?id=66504966>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Salas & Ciolfi, *supra* note 116, at 3.

¹³⁵ See N.Y. Veh. & Traf. Law § 503(j-1)(i); New York State Department of Motor Vehicles, *A Guide to Suspension & Revocation of Driving Privileges in New York State*, <https://dmv.ny.gov/brochure/c-12.pdf> (last visited Sep. 2, 2020).

¹³⁶ *Id.*

the driver's license suspension rate in the ten zip codes with the highest concentrations of people of color is two-and one-half times higher than in the zip codes with the most concentrated White populations.¹³⁷ Outside of New York City, the suspension rate in the ten zip codes with the highest concentration of people of color is four times higher than in the ten zip codes with the most concentrated White populations.¹³⁸ In Florida, suspended licenses for Black drivers are one and a half times their proportion in the general population.¹³⁹ As the United Nations Special Rapporteur on extreme poverty and human rights observed:

So-called fines and fees are piled up so that low level infractions become immensely burdensome, a process that affects only the poorest members of society, who pay the vast majority of such penalties. Driving licenses are also commonly suspended for a wide range of non-driving related offences, such as a failure to pay fines. This is a perfect way to ensure that the poor, living in communities that have steadfastly refused to invest in serious public transport systems, are unable to earn a living that might have helped to pay the outstanding debt. Two paths are open: penury, or driving illegally, thus risking even more serious and counterproductive criminalization.¹⁴⁰

Another consequence of unpaid fines and fees is the loss of one's voting rights. Many states prohibit people who suffer felony convictions from voting. The process of restoring those rights—re-enfranchisement—varies in every state, as do the conditions required to regain one's voting rights.¹⁴¹ One condition often imposed, however, is the payment of court debt. In eleven states, people who seek to have their voting rights restored must first pay off all of the fines and fees they owe.¹⁴² Once again, the racial disparities in the criminal legal system are implicated. “Nationwide,

¹³⁷ Joanna Weiss & Claudia Wilner, *Opportunity Suspended: How New York's Traffic Debt Suspension Laws Disproportionately Harm Low-Income Communities and Communities of Color*, A STORY MAP BY THE DRIVEN BY JUSTICE COALITION, Drivenbyjustice.org (last visited Sep. 2, 2020) (analyzing data from the New York Department of Motor Vehicles 2016-2017).

¹³⁸ *Id.*

¹³⁹ Carson Whitelemons et al., *Driving on Empty: Florida's Counterproductive and Costly Driver's License Suspension Practices*, FINES AND FEES JUSTICE CENTER (Dec. 2, 2019), <https://finesandfeesjusticecenter.org/articles/driving-on-empty-florida-drivers-license-suspension-fines-fees/>.

¹⁴⁰ United Nations Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on his Mission to the United States of America*, A/HRC/38/33/Add.1, 48, (May 4, 2018) Phillip Alston (Special Rapporteur).

¹⁴¹ *Felon Voting Rights*, NAT'L CONF. ST. LEGIS. (July 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

¹⁴² Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT (June 27, 2019), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

as of 2016, one in every thirteen Black adults could not vote as the result of a felony conviction, and in four states – Florida, Kentucky, Tennessee, and Virginia – more than one in five Black adults were disenfranchised.”¹⁴³

Collectively, these practices perpetuate and exacerbate poverty and tether people to the criminal legal system for years. In 2019, Alabama Appleseed released the results of a survey of 879 Alabama natives who owed court debt.¹⁴⁴ The findings vividly portray how fines and fees criminalize poverty. Almost seven in ten of those surveyed were at some point declared indigent by a court; almost two-thirds did not have a bank account; and over half were unemployed.¹⁴⁵ More than eight in ten gave up necessities like rent, food, medical bills, car payments, and child support in order to pay their court debt; forty-four percent used payday or title loans to cover their court debt.¹⁴⁶ Nearly half had been jailed for failure to pay their fines and fees, despite the fact that fully eighty percent of those jailed had been declared indigent by the court.¹⁴⁷ A majority reported that they owed court debt for one to five years; the average length of time people reported that they had been in debt was 54.75 months – or four and one-half years.¹⁴⁸ Thirty-eight percent admitted to committing at least one crime to pay off their fines and fees.¹⁴⁹

V. THE CONSTITUTIONAL CONSTRAINTS ON FINES AND FEES

A system that disproportionately impacts poor people and people of color, that can result in incarceration because of debt, and that punishes people more harshly based on their economic status raises constitutional concerns. Although the United States Supreme Court has held unequivocally that legislative classifications that discriminate on the basis of wealth are not “suspect” for purposes of constitutional analysis,¹⁵⁰ the Court has repeatedly found laws and practices in the justice system that

¹⁴³ *Id.*

¹⁴⁴ *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama’s Racial Wealth Divide*, ALA. APPLESEED CTR. LAW & JUST. (2018), <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

¹⁴⁵ *Id.* at 29-30.

¹⁴⁶ *Id.* at 14.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 27.

¹⁴⁹ *Id.* at 14.

¹⁵⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

discriminate on the basis of poverty to be unconstitutional.¹⁵¹ A variety of constitutional doctrines implicate fines and fees, but, at least at present, their impact is limited to the enforcement rather than the imposition of fines and fees. “The Court has not held that fines will be structured to reflect each person’s ability to pay in order to avoid disproportionate burdens.”¹⁵²

In a line of cases beginning in 1956, the U.S. Supreme Court has developed a unique standard for determining the constitutionality of laws and regulations that treat people involved in the justice system more harshly because of their poverty. The Court has recognized that due process and equal protection principles are implicated in these claims but has eschewed its traditional approach to either doctrine. In *Bearden v. Georgia*, the Court applied the “fundamental fairness doctrine,” requiring the Court to examine (1) “the nature of the individual interest affected,” (2) “the extent to which it is affected,” (3) “the rationality of the connection between the legislative means and purpose,” and (4) “the existence of alternative means to effectuate this purpose.”¹⁵³ In *Bearden*, the Court found that revoking probation and incarcerating a defendant who was too poor to pay their court fines and fees violated fundamental fairness.¹⁵⁴ The Court held that a court can incarcerate a person for nonpayment of their court debt only if the court finds that the defendant’s nonpayment was willful, and to make a finding of willfulness, the Court must find that the defendant has the actual ability to pay the amount that they owe.¹⁵⁵

The Court, however, has also recognized limits on the principle of protecting indigents in the criminal justice system. For example, in *Ross v. Moffitt*, the Court held that indigent defendants do not have a constitutional right to appointed counsel for a discretionary appeal; and in *United States v. MacCollum*, the Court rejected a challenge to a federal statute that permits a district court to provide an indigent defendant with a free trial transcript unless the court certifies that the objections to their conviction is not frivolous and the transcript is necessary to prepare a petition.¹⁵⁶

¹⁵¹ See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983); *ML.B. v. S.L.J.*, 519 U.S. 102, 111 (1996).

¹⁵² *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 3:15-CV-01048, 22 (M.D. Tenn. February 5, 2020).

¹⁵³ *Bearden*, 462 U.S. at 666-67.

¹⁵⁴ *Id.* at 674.

¹⁵⁵ *Id.* at 672.

¹⁵⁶ See *Ross v. Moffitt*, 417 U.S. 600 (1974); *United States v. MacCollum*, 426 U.S. 317 (1976).

The Fundamental fairness doctrine has been used by litigators to successfully challenge debtor's prisons.¹⁵⁷ In other cases, litigators have challenged the court's incarceration of people for unpaid fines and fees, but have had less success in cases challenging state laws that suspend or revoke a person's driver's license suspensions for unpaid fines and fees.¹⁵⁸ In the driver's license suspension cases, the courts have reverted to traditional equal protection analysis, that is, they determine whether the strict scrutiny or rational basis review applies to the law or practice at issue. Because, as noted, the Supreme Court has held that wealth or income-based classifications are not subject to strict scrutiny, rational basis review has been and likely will continue to be the test employed.¹⁵⁹ Rational basis review requires a court to determine, first, if a law treats similarly situated individuals differently; and if it does, to then assess whether the law is rationally related to a legitimate government interest.¹⁶⁰ The standard is generally considered to be highly deferential to lawmakers.¹⁶¹ However, because plaintiffs have won more than twenty rational basis cases before the Supreme Court since 1970,¹⁶² there is more to rational basis review than conventional wisdom suggests.

¹⁵⁷ See, e.g., *Jenkins v. City of Jennings*, 4:15-cv-00252-CEJ (E.D. Mo. Feb. 13, 2017); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015).

¹⁵⁸ See *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019); *Mendoza v. Garrett*, No. 3:18-cv-01634-HZ, 2019 U.S. Dist. LEXIS 85906 (D. Or. May 16, 2019).

¹⁵⁹ There is a possibility that a court may consider strict scrutiny if a "clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

¹⁶⁰ *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

¹⁶¹ Rational Basis Test, LAW LIBRARY - AMERICAN LAW & LEGAL INFORMATION, <https://law.jrank.org/pages/9651/Rational-Basis-Test.html> (last visited Sep. 3, 2020).

¹⁶² See *United States v. Windsor*, 570 U.S. 744, 774 (2013); *id.* at 793-94 (Scalia, J., dissenting) (noting that the Court relied on rational basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614-15 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 449-50 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 76-78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970).

Turning to the first question – whether fines and fees laws treat similarly situated people differently, the answer with respect to the imposition of fines and fees may well be no. A court could conclude that since every person receives the same monetary sanctions if they are convicted of the same offense, there is no discrimination. With respect to the enforcement of monetary sanctions, although at least one court has held that poor people are punished more harshly than people with money,¹⁶³ one could certainly imagine a court concluding that everyone is treated the same if they don't pay what they owe. Still, reviewing the cases in which plaintiffs have prevailed under a rational basis standard demonstrates that the Supreme Court invalidates government action under rational basis review when it is persuaded that: (1) there is no logical connection between the government's action and its proffered interest; and, (2) when the harm that results from the government's action vastly outweighs any plausible benefit.¹⁶⁴ In considering these factors, the Court evaluates the challenged action in the context of the record and wider statutory background. If that more expansive rational basis test is used, both imposition and enforcement statutes may well be struck down.

A third constitutional principle—due process—has been more successful than either fundamental fairness or rational basis. In *Cain v. White* and *Caliste v. Cantrell*, two separate Fifth Circuit panels held that the New Orleans Parish Criminal District Court engaged in a process of assessing and enforcing bail and court fines and fees that violated defendants' due process right to a neutral decisionmaker.¹⁶⁵ The decisions held that because the judges both assessed monetary conditions and sanctions and administered the funds after they were collected, they would not be perceived by an average person to provide a neutral forum.¹⁶⁶ Due process may well prove a successful claim where the facts are like those in *Cain* and *Caliste*.

The final constitutional doctrine that applies to fines and fees is the Excessive Fines Clause of the Eighth Amendment. The Clause prohibits government from imposing “excessive fines,” and recent U.S. and state supreme court decisions have focused attention on the its potential for challenging fines and fees. In *Timbs v. Indiana*, the U.S. Supreme Court unanimously held that the Excessive Fines Clause applies to state and local

¹⁶³ *Robinson v. Purkey*, 326 F.R.D. 105 (M.D. Tenn. 2018).

¹⁶⁴ The Supreme Court also invalidates state actions under a rational basis standard when they are based on an illegitimate interest. *See, e.g., Ward*, 470 U.S. at 878 (economic favoritism); *Romer*, 517 U.S. at 635 (anti-gay animus); *Cleburne*, 473 U.S. at 450 (anti-disabled animus).

¹⁶⁵ *Cain v. White*, 937 F.3d 446,450-51 (5th Cir. 2019); *Caliste v. Cantrell*, 937 F.3d 525, 526 (5th Cir. 2019).

¹⁶⁶ *Cain*, 937 F.3d at 454; *Caliste*, 937 F.3d at 532.

government.¹⁶⁷ The Court found that the Clause is “both ‘fundamental to our scheme of ordered liberty’ and ‘deeply rooted in this Nation’s history and tradition.’”¹⁶⁸ Virtually every state also has an Excessive Fines Clause in its state constitution, allowing for state as well as federal constitutional claims to be raised.¹⁶⁹ There has been a dearth of Excessive Fines Clause litigation, and accordingly, there are many unanswered questions regarding its potential. Though traditional fines are of course subject to the Clause; it is an open question whether fees would be. The Court has held that the Clause protects individuals from the government “abusing its power to punish.”¹⁷⁰ Thus, to apply the Excessive Fines Clause to fees would require a plaintiff to demonstrate that the fee being challenged is at least “partially punitive.”¹⁷¹

The second significant question that has not been definitely resolved is the standard by which courts will determine excessiveness. Although in *Timbs*, the Court suggested strongly that it would consider whether the fine was excessive both with respect to the underlying offense and with respect to the defendant’s economic circumstances, it did not adopt a test.¹⁷² However, recent state supreme court opinions have adopted that two-pronged approach, making it likely that a court could well determine that monetary sanctions might be excessive when applied to an indigent individual but not to a person of economic means.¹⁷³

VI. REFORMING FINES AND FEES PRACTICES

The imposition and enforcement of fines and fees in the criminal legal system wreak havoc on people’s lives and destabilize communities. The policies and practices that have developed over the last forty years are entrenched in the system, and government at all levels has come to rely on the revenue generated by fines and fees. Over the last five years, policy makers have begun to recognize the need for change. Sometimes reforms have been forced upon jurisdictions as the result of litigation; often advocates have been able to persuade lawmakers to end particularly

¹⁶⁷ *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

¹⁶⁸ *Id.* at 689 (internal citations omitted).

¹⁶⁹ *Id.*

¹⁷⁰ *Austin v. United States*, 509 U.S. 602, 610-11 (1993) (quoting *Browning-Ferris Indust. of Vt., Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 265 (1989)).

¹⁷¹ *Id.*

¹⁷² *Timbs*, 139 S. Ct. at 690.

¹⁷³ *State v. Timbs*, 134 N.E.3d 12 (Ind. 2019); *Colo. Dep’t of Lab. & Emp., Div. of Workers’ Comp. v. Dami Hosp., LLC*, 442 P.3d 94 (Colo. 2019), *cert. denied*, 140 S. Ct. 849 (2020).

destructive practices. In a few instances, fees have actually been eliminated altogether.¹⁷⁴

First, with respect to the imposition of fines and fees, several reforms merit mention. California, Nevada, and Maryland recently passed legislation prohibiting the imposition of fines and fees in juvenile delinquency cases.¹⁷⁵ In California, state law allows, but does not require counties to impose a variety of fees like probation fees and electronic monitoring fees. San Francisco, Alameda, Contra Costa, and Los Angeles counties all exercised their discretion to eliminate those fees.¹⁷⁶ In April 2020, Ramsey County, Minnesota Board voted to eliminate eleven criminal justice fees, totaling approximately \$675,000 annually. The fees eliminated include a \$300 probation supervision fee; a \$16 daily fee for home electronic monitoring; a \$3 fee for diabetic supplies in jail; and a fee of 25 cents per pill for over-the-counter medication while in custody.¹⁷⁷ New York City and the City and County of San Francisco have made phone calls to and from jail

¹⁷⁴ Although a comprehensive review of all of the reforms implemented at the state and local level throughout the United States is beyond the scope of this article, some of the most important and far-reaching reforms are by The Fines and Fees Justice Center's online library of reform. See *The Clearinghouse*, FINES & FEES JUSTICE CENTER, <https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true> (last visited Aug. 30, 2020).

¹⁷⁵ *California SB 190: Juveniles*, FINES & FEES JUSTICE CENTER (Jan. 26, 2017), <https://finesandfeesjusticecenter.org/articles/california-sb-190-juveniles/>; Nevada Assembly Bill 439: Abolishes Juvenile Fees, FINES & FEES JUSTICE CENTER (Mar. 25, 2019), <https://finesandfeesjusticecenter.org/articles/nevada-assembly-bill-439-abolishes-juvenile-fees/>; Michael Hardy, *How Baltimore Teens Helped Push Maryland Lawmakers Abolish Juvenile Fees and Fines*, ARNOLD VENTURES (May 26, 2020), <https://www.arnoldventures.org/stories/new-laws-make-maryland-a-national-leader-in-eliminating-fees-and-fines/>.

¹⁷⁶ See Peter Hegarty, *Alameda County Eliminates Some Criminal Justice Fees that Saddle Inmates*, THE MERCURY NEWS (Nov. 21, 2018, 10:28 AM), <https://www.mercurynews.com/2018/11/20/alameda-county-eliminates-some-criminal-justice-fees-that-saddle-inmates/>; Jackie Botts, *Los Angeles County Eliminates Criminal Fees. Will California Follow?*, CALMATTERS (Feb. 19, 2020), <https://calmatters.org/california-divide/2020/02/los-angeles-county-eliminates-criminal-fees/>.

¹⁷⁷ Shannon Prather, *Ramsey County Eliminates Nearly \$700,000 in Criminal Fines and Fees*, STAR TRIBUNE (Apr. 14, 2020, 9:59 PM), <https://www.startribune.com/ramsey-county-eliminates-nearly-700-000-in-criminal-fines-and-fees/569640712/?refresh=true>.

free.¹⁷⁸ Similarly, Texas dramatically lowered the price of phone calls from prison.¹⁷⁹

Other reforms have required courts to consider a person's ability to pay when imposing fines and fees and allowed judge's discretion to waive or reduce court debt or consider alternative sanctions such as community service. In 2017, the Texas Legislature passed and the Governor signed Senate Bill 1913, a bill that changed the way fines and fees are imposed in fine-only misdemeanor cases.¹⁸⁰ A fine-only misdemeanor is a misdemeanor for which a fine is the only possible sanction; no time in custody is authorized. In Texas, those misdemeanors include traffic and other low-level offenses that are adjudicated in the state's over 1,000 municipal courts. The new law requires that judges conduct ability-to-pay assessments either before or immediately after sentencing.¹⁸¹ If the judge finds that the person cannot afford to pay the fines and fees that would ordinarily be imposed, the judge must: a) waive or reduce the fines and fees; b) convert the fines and fees to community service; c) offer the person a payment plan; or d) any combination of the above.¹⁸²

With respect to debtor's prisons, in Jackson and Biloxi, Mississippi, in Benton County, Washington, in Jennings, Missouri, in Montgomery, Alabama, in New Orleans, Louisiana and other jurisdictions around the country, advocates like the ACLU, the Southern Poverty Law Center, Equal Justice Under Law, and the Southern Center for Human Rights have either settled or won lawsuits challenging debtor's prisons.¹⁸³ Litigation has also been successful against private probation company practices, with Georgia enacting legislation in 2015 that resulted in at least one private

¹⁷⁸ Zoe Greenberg, *Phone Calls from New York City Jails Will Soon Be Free*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/nyregion/phone-calls-free-nyc-jails.html>; Ben Klein, *San Francisco to Make Phone Calls from Jail Free, Eliminate Markups on Items Sold in Jail*, DAILY CALIFORNIAN (June 25, 2019), <https://www.dailycal.org/2019/06/24/san-francisco-to-make-phone-calls-from-jail-free-eliminate-markups-on-items-sold-in-jail/>.

¹⁷⁹ *Texas Dramatically Reduces Cost of Phone Calls from Prison*, EQUAL JUSTICE INITIATIVE (Aug. 27, 2018), <https://eji.org/news/texas-dramatically-reduces-price-phone-calls-prison/>.

¹⁸⁰ *Texas SB 1913: Relating to Consequences Imposed on Persons Arrested for, Charged with, or Convicted of Certain Criminal Offenses*, FINES & FEES JUSTICE CENTER (June 20, 2017), <https://finesandfeesjusticecenter.org/articles/texas-sb-1913-fines-fees/>.

¹⁸¹ *Id.*

¹⁸² *Id.* Community service is broadly defined to include job training, GED prep classes, mentoring programs, and work at a nonprofit organization.

¹⁸³ See cases cited *supra* note 103; *Shutting Down Debtors' Prisons*, EQUAL JUSTICE UNDER LAW, (describing lawsuits in Alabama, Louisiana, Mississippi, and Missouri).

probation company, Sentinel Offender Services, withdrawing from the state.¹⁸⁴

Litigation has also been filed challenging driver's license suspensions in Tennessee, North Carolina, Oregon, Alabama, Montana, Michigan and Virginia.¹⁸⁵ Although several of the cases were decided favorably in district courts, those opinions have been overturned on appeal. For example, in Tennessee, Federal District Court Judge Aleta Trauger wrote a lengthy decision finding that Tennessee's practice of automatically revoking driver's licenses for unpaid court debt was unconstitutional on both equal protection and due process grounds because the state did not assess ability to pay before suspending licenses.¹⁸⁶ Employing a rational basis standard for the equal protection claim, she found that the statute mandating revocation was not rationally related to the goal of inducing people to pay their court debt, because it was both counterproductive and ineffective.¹⁸⁷ Judge Trauger found that people need to drive to get to work, and they need to work to pay off their court debt.¹⁸⁸ She also found that very few Tennessee citizens paid their court debt after their licenses were revoked, resulting in many people staying suspended for many years. She found on due process grounds that the failure to conduct an ability to pay assessment before a license was suspended meant that poor people received an additional punishment for the same underlying offense simply because they were poor.¹⁸⁹ The Sixth Circuit, however, reversed her decision, resting entirely on a decision issued after Judge Trauger issued her opinion, in a case challenging Michigan's driver's license suspension scheme. In the Michigan case, *Fowler v. Benson*,¹⁹⁰ the Court found under a rational basis standard, that driver's license suspensions were not "devoid of a rational basis" even though they may be "unwise, even counterproductive."¹⁹¹

More progress has been made to eliminate debit-based suspensions legislatively. Advocates, community organizations, and impacted individuals have persuaded several state Legislatures to prohibit driver's license suspension for unpaid fines and fees. In September 2019, a national campaign to prohibit debt-based suspensions, *Free to Drive*, was

¹⁸⁴ Lorelei Laird, *Private Probation Company Pulls Out of Georgia, Saying It Can No Longer Make a Profit*, ABA JOURNAL (Apr. 17, 2017, 8:00 AM), http://www.abajournal.com/news/article/private_probation_company_pulls_out_of_georgia_saying_it_can_no_longer_make.

¹⁸⁵ See *The Clearinghouse*, *supra* note 174.

¹⁸⁶ *Robinson v. Purkey*, 326 F.R.D. 105, 148 (M.D. Tenn. 2018).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 156.

¹⁸⁹ See generally *id.*

¹⁹⁰ *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019), 924 F.3d 247 (6th Cir. 2019).

¹⁹¹ *Id.* at 262, 252.

launched, and it has made notable progress.¹⁹² In the last two years, California, Hawaii, Idaho, Montana, Mississippi, Oregon, Virginia, West Virginia, and the District of Columbia all stopped their suspension practices.¹⁹³ A comprehensive bill eliminating suspensions for both failure to appear in court and failure to pay court debt passed the New York state legislature in July and is awaiting action by the Governor.¹⁹⁴ In Maryland, the legislature passed and the Governor signed a bill eliminating suspensions in traffic cases, although they remain for misdemeanor and felony debt.¹⁹⁵

VII. CONCLUSION

The fines and fees regime that has come to dominate the U.S. criminal legal system criminalizes poverty. The imposition and enforcement of fines and fees extracts millions of dollars from low-income communities of color and traps people in the criminal legal system. Fines and fees raise fundamental questions of equity, fairness and the purpose of punishment. How should government be funded? What conduct should we criminalize, and what, if any purpose does the use of monetary sanctions serve?

Though the issues are complex, with respect to fines and fees, there are some easy answers that, although they will not address all of the ways the criminal legal system criminalizes poverty and exacerbates racial disparities, will dramatically improve the system for millions of Americans. First, fees should be eliminated from the criminal legal system. There is simply no defensible reason to impose fees that fund services and programs wholly unrelated to the legal system on people charged with criminal offenses. Why should people who receive traffic tickets be paying a larger percentage of the cost of the Fish and Game Service in California than people who either don't speed or don't get caught? So-called "user fees" are equally indefensible. The justice system is charged with enforcing rights and responsibilities, resolving disputes fairly, and keeping communities safe. The system serves all of us, and it should be paid for by all of us through general revenue.

Second, fines should be proportionate to the offense and the individual, and fines should rarely, if ever, be imposed on people who are serving time in custody or under supervision, like probation. If imposed at all, fines should be returned to their historical origin as an alternative to

¹⁹² See generally FREE TO DRIVE, <https://www.freetodrive.org/> (last visited Aug. 31, 2020).

¹⁹³ *Id.*

¹⁹⁴ S. 5348B, 2019-2020 LEGIS. SESS., REG. SESS. (N.Y. 2019).

¹⁹⁵ See FREE TO DRIVE, *supra* note 192.

custody. If a person is sentenced to jail or prison, one has to ask what the additional penological purpose a fine could serve. Fines people will never be able to afford to pay don't help them to become law-abiding, and imposing a punishment that an individual is unlikely ever to be able to complete, turns every sentence into a life sentence. Fines that serve as the primary punishment for a minor offense need to be set at an amount the individual has the present ability to pay without causing economic hardship. And people need to be allowed access to reasonable payment plans that allow them to make small payments easily for limited periods of time.

Though these policies are easy to articulate, they will likely prove difficult to implement. Still, they are essential steps on the path to ensuring that government stops extracting billions of dollars from low-income communities of color by criminalizing poverty.