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# NICKEL AND DIMED INTO INCARCERATION: CASH-REGISTER JUSTICE IN THE CRIMINAL SYSTEM

LAURA I APPLEMAN\*

**Abstract:** Criminal justice debt has aggressively metastasized throughout the criminal system. A bewildering array of fees, fines, court costs, non-payment penalties, and high interest rates have turned criminal process into a booming revenue center for state courts and corrections. As criminal justice “administrative” costs have skyrocketed, the burden to fund the system has fallen largely on the system’s users—primarily poor or indigent—who often cannot pay their burden. Unpaid criminal justice debt often leads to actual incarceration or substantial punitive fines, which turns rapidly into “punishment”. Such punishment at the hands of a court, bureaucracy, or private entity compromises the Sixth Amendment right to have all punishment imposed by a jury. This Article explores the netherworld of criminal justice debt and analyzes implications for the Sixth Amendment jury trial right, offering a new way to attack the problem. The specter of “cash-register justice,” which overwhelmingly affects the poor and dispossessed, perpetuates hidden inequities within the criminal justice system. This Article offers solutions rooted in Sixth Amendment jurisprudence.

## INTRODUCTION

“Cash register justice” likely killed Sandra Bland. Bland was stopped by a Texas State Trooper for failing to signal—a minor traffic law violation.<sup>1</sup> The encounter escalated until the trooper ultimately arrested Bland on suspicion of assaulting a public servant, a felony.<sup>2</sup> The judge set bail at \$5,000,<sup>3</sup> which Bland’s family could not immediately afford, so she was sent to the county

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<sup>1</sup> Debbie Nathan, *The Real Reason Sandra Bland Got Locked up*, THE NATION (Dec. 18, 2015), <https://www.thenation.com/article/the-real-reason-sandra-bland-got-locked-up/> [https://perma.cc/MD8U-HAKF].

<sup>2</sup> Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (Jul 23, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/07/sandra\\_bland\\_is\\_the\\_bail\\_system\\_that\\_kept\\_her\\_in\\_prison\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html) [https://perma.cc/Z8T6-6WV6].

<sup>3</sup> See *id.* In Waller County, Texas, where Bland was arrested and imprisoned, an offender would usually be required to pay 10% of the bond amount set, which, in this case, was \$500. See *id.*

jail.<sup>4</sup> Three days later, Bland hanged herself in custody with a plastic bag, her body hanging from a privacy partition.<sup>5</sup> In this case, a routine stop and arrest turned into a tragedy. Although Bland's interaction with the criminal justice system had many troubling aspects,<sup>6</sup> the role of cash register justice—where only those who can afford the high price of justice will receive it—is undeniable. The crushing burden of criminal justice debt has quietly punished the poor and indigent for over three decades and Bland's death exemplifies the problem's depth.

Several factors pushed Bland's criminal justice encounter towards fatality. First, Texas has a notoriously high incidence of traffic stops,<sup>7</sup> and the fees and fines this garners helps finance its criminal justice system,<sup>8</sup> necessary in a state without income tax.<sup>9</sup> Accordingly, even minor adverse interactions citizens have with either Texas law enforcement or the courts cost them substantially. Second, once the troopers arrested Bland, the court set her bail fee at \$5,000, far more than she or her family could easily afford.<sup>10</sup> The court did not consider her financial circumstances. Like many counties, Waller County, Texas, has a pre-set list of bail amounts applicable for each crime charged, with little discretion given to an offender's financial status,<sup>11</sup> despite a Texas law that required individual consideration of a pre-trial arrestee's finances.<sup>12</sup> As a partial result of the "fixed bail system", Waller County exhibits one of the highest rates of pre-trial incarceration in Texas, over seventy percent of charged of-

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<sup>4</sup> *See id.*

<sup>5</sup> Associated Press, *Texas Trooper Indicted in Sandra Bland Traffic Stop and Arrest Is Formally Fired*, THE GUARDIAN (Mar. 2, 2016), <https://www.theguardian.com/us-news/2016/mar/02/texas-trooper-fired-sandra-bland-death> [<https://perma.cc/HGQ8-NCGC>].

<sup>6</sup> Of course, Bland's arrest and death implicate a number of disturbing aspects of the criminal justice system apart from "cash register justice," including police brutality, racial profiling, and the justice system's ongoing failure to regularly indict police officers for crimes against citizens.

<sup>7</sup> *See Dallas County Looks to Traffic Ticket Revenue for Budget Shortfall*, GRITS FOR BREAKFAST BLOG (Feb. 9, 2009), <http://gritsforbreakfast.blogspot.com/2009/02/dallas-county-looks-to-traffic-ticket.html> [<https://perma.cc/WLE6-G92E>]. Texas has so vigorously enforced their speeding laws that approximately 10% of Texas citizens have an outstanding arrest warrant pending, primarily for unpaid traffic tickets. *See id.*

<sup>8</sup> *See* Byron Harris, *Judge Says He Quit Over Speeding Ticket Quota*, WFAA (Jun. 3, 2015), <http://www.wfaa.com/story/news/local/investigates/2015/06/02/former-judgesays-he-quit-because-of-speeding-ticket-quota/28367771/> [<https://perma.cc/Y7ML-68PT>]. This system of frequent traffic stops is used throughout Texas to help fund the criminal justice system, where "the municipal court is their cash cow." *See id.*

<sup>9</sup> *See* Nathan, *supra* note 1. "As in Ferguson, Missouri, stopping drivers and ticketing them is how Waller County makes a lot of money." *See id.*

<sup>10</sup> *See* Neyfakh, *supra* note 2.

<sup>11</sup> *See id.* This bond was automatically set despite the Texas law requiring flexibility in determining bail amounts. *See* TEX. CODE CRIM. PROC. arts. 17, 15 (2015).

<sup>12</sup> *See* TEX. CODE CRIM. PROC. arts. 17, 15.

fenders.<sup>13</sup> Bland's death illustrates how even a short stay in jail can quickly and tragically unravel the lives of those who cannot afford their criminal justice debt.

In recent years, criminal justice debt has aggressively metastasized throughout the criminal system.<sup>14</sup> Private probation, bail fees, translation fees, indigent representation fees, dismissal fees, high interest rates, jail and prison costs, court fines, and community service charges, among other financial "innovations," have turned criminal process into a booming source of revenue for state courts and corrections departments.<sup>15</sup> Many citizens, whether or not they are convicted, are saddled with heavy debt and the constant threat of incarceration as a result of their interaction with the criminal courts.<sup>16</sup> At last count, approximately ten million people owe more than fifty billion dollars in debt as a result of their involvement in the criminal justice system.<sup>17</sup> As officials in Riverside County, California noted after approval of a plan to charge inmates for their incarceration, "You do the crime, you will serve the time, and now you will also pay the dime."<sup>18</sup>

By imposing fees and fines at every turn, the criminal justice system has mutated into a bewildering labyrinth for the average criminal offender, who must pay onerous "user" fees for every brush with the criminal courts. As criminal justice costs have skyrocketed, the burden to fund the system has fallen largely on the system's users, primarily the poor or indigent. As a result, funding of the criminal justice system has disproportionately fallen on those least able to pay. What results is a two-tiered system of punitive debt that especially punishes the poor. Because this criminal justice debt, if left unpaid, has the potential to turn into actual incarceration or substantial fines, these endless fees, fines, and cost can add up to much more serious punishment. This violates the Sixth Amendment right to have all punishment decided by a jury. The Supreme Court has repeatedly held that only the jury may impose or increase punishment on offenders.<sup>19</sup> Despite local court practice, there are no Sixth

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<sup>13</sup> See TEXAS COMM'N ON JAIL STANDARDS, ABBREVIATED POPULATION REPORT FOR 8/1/2016 (2016).

<sup>14</sup> See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4, 7 (2010).

<sup>15</sup> See generally *id.* (describing the onerous burden that "user fees" in the criminal justice system have on communities, taxpayers, and indigents).

<sup>16</sup> See *id.*

<sup>17</sup> See Lauren-Brooke Eisen, *Curbing Cash Register Style Justice*, AM. CONST. SOC'Y FOR L. & POL'Y: ACSBLOG (Oct. 26, 2015), <https://www.acslaw.org/acsblog/curbing-cash-register-style-justice> [<https://perma.cc/6EBE-TJRZ>].

<sup>18</sup> See Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 324 (2014).

<sup>19</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296, 300, 318 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000); see also *infra* notes 266–292 and accompanying text.

Amendment exceptions permitting the arbitrary determination of punishment by administrative decision-makers, especially when those decision-makers extract financial sanctions from the poor.

This Article explores the netherworld of criminal justice debt and analyzes it through the constitutional lens of the Sixth Amendment jury trial right. Although a small body of literature exists on the negative consequences of harsh monetary sanctions for offenders, this Article is the first to offer a full examination of the philosophical and Sixth Amendment constitutional ramifications of such sanctions, as well as providing a comprehensive taxonomy of the kinds of debt arising from the criminal justice system.

The steamrolling array of fees, fines, court costs, penalties, and additional incarceration both disproportionately affects the poor and routinely violates the community jury trial right. This Article applies the Sixth Amendment constitutional screen to this growing problem of crushing criminal justice debt, offering a new way to attack the problem and providing some useful ideas for community solutions.

Part I of this Article examines the inexorable rise of financial motives in the criminal justice system.<sup>20</sup> It takes a careful look at such “innovations” as usage fees, which are court imposed fees levied on arrestees and defendants for their arrest, adjudication, and incarceration. Part I also explores public defender fees, bail fees, booking fees, translation and disability fees, private probation services and associated (and required) fees, assessments, jail and prison fees, criminal restitution, supervision fees, post-conviction fees, community service fees, and fees for expungement. Any interaction with the criminal justice system now inevitably invokes an entire complex universe of economic sanctions.

Part II applies the Sixth Amendment jury trial right to these criminal justice debts, and finds that many of these court-imposed, administratively or privately devised fees, fines, and strictures violate the right of the community to determine all punishments.<sup>21</sup> The Supreme Court’s continuing fidelity to the Sixth Amendment jury trial right makes clear that these types of financial sanctions may only be imposed by a local community jury, not the bureaucracy of the courts or the corrections system.

Part III tackles the related and important question of when criminal justice debt rises to the level of punishment.<sup>22</sup> In other words, when does the reduction in liberty concomitant with being arrested, indicted or convicted of a crime become punitive? To answer this question, Part III looks to retributive theory as well as a subjective understanding of punishment. The question of

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<sup>20</sup> See *infra* notes 27–265 and accompanying text.

<sup>21</sup> See *infra* notes 266–292 and accompanying text.

<sup>22</sup> See *infra* notes 293–342 and accompanying text.

when the denial of liberties transmutes into punishment in the carceral realm has been previously raised in the Eighth Amendment context, both under the Excessive Fines Clause<sup>23</sup> and the Cruel and Unusual Punishment Clause. This question, however, has never been explored from the viewpoint of the Sixth Amendment's community jury trial right, an analysis this Article provides.

Part IV offers some partial solutions to the problems caused by the metastasizing growth of criminal justice debt inspired by the Sixth Amendment mandate of community participation in criminal justice.<sup>24</sup> These solutions include greater community input in community policing, prosecution, and court procedures. Involving the local community provides transparency for the process and may inspire unique and original ideas for what will best serve local neighborhoods. This participation will hopefully also reduce community resentment, anger, and frustration with the criminal justice system. In addition, Part IV explores how community involvement is especially important with indigent defendants, who have no other outside voices to articulate their needs.

Finally, this Article concludes that if we cannot entirely eradicate this proliferation of criminal justice debt from the justice system, minimizing, controlling, and regulating it is the next best option.<sup>25</sup> Using the power of the community to eradicate the most abusive practices will give some protection to offenders, as well as help better reintegrate them back into the community. Courts, for-profit corrections, and bureaucracy will not be able to solve this problem; community members must become involved to shine light on these abuses. This recent explosion of fees, fines, and penalties is a disquieting feature of our current criminal justice system. “[A]t the bottom of the penal pyramid[,] where offenses are pettiest and defendants are poorest,”<sup>26</sup> there is little fairness or due process. Cash register justice, which overwhelmingly affects the poor and dispossessed, perpetuates the extreme inequities hidden within the criminal justice system.

#### I. BAD PRACTICES, WORSE RESULTS: FEE PROFUSION IN THE CRIMINAL JUSTICE SYSTEM

The twenty-first century criminal justice system features a labyrinth of fees, fines, and costs. Criminal courts impose financial sanctions on millions of

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<sup>23</sup> See generally Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014) (broadening the scope of the Excessive Fines Clause to provide greater individual protection to those within the criminal justice system).

<sup>24</sup> See *infra* notes 343–429 and accompanying text.

<sup>25</sup> See *infra* notes 430–433 and accompanying text.

<sup>26</sup> Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012).

U.S. residents convicted of felony and misdemeanor crimes each year.<sup>27</sup> Additionally, a public-private criminal justice industry streams through every city jail, rural prison, suburban probation office, and immigration detention center.<sup>28</sup> All of these money-making innovations, including usage fees, public defender payments, assessments, private probation and parole, community service fees, and high interest payments, to give a few examples, harshly affect criminal defendants, particularly those near or below the poverty line.

Although standing alone, each individual financial imposition may seem reasonable, in sum they can create devastating results for offenders.<sup>29</sup> Generally speaking, “criminal justice debt” refers to a wide range of financial penalties. The Model Penal Code, in defining criminal justice debt, has delineated roughly six types of economic sanctions: (1) restitution, (2) fines, (3) costs, (4) fees, (5) assessments, and (6) asset forfeiture.<sup>30</sup> Briefly defined, restitution repays victims for losses suffered; fines both punish the offender and deter others from committing the same crimes; costs defray “administrative” expenses, whether incurred by the offender or not; fees cover services rendered by the court; assessments help repay expenditures discharged during the offender’s interaction with the criminal justice system; and asset forfeiture refers to government seizure of property that was illegally obtained or was used in an illegal activity.<sup>31</sup> Additionally, criminal justice debt can also include surcharges, which operate as cost multipliers on top of other penalties.<sup>32</sup> In many instances, the collected quantity of administrative “costs, fees, surcharges, and the like” exceeds any formally punitive sanctions owed in a defendant’s case.<sup>33</sup> These financial penalties arrive in many guises, including statutory fines, money and property forfeiture, incarceration fees, restitution awards, court costs, public defender fees, probation and parole charges, and various levels of interest when these sanctions are not paid in full.<sup>34</sup>

In other words, the seemingly endless array of fees, costs, and charges, although frequently classified as non-punitive, can have a greater negative impact on an individual offender than the actual, official punishment. This is par-

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<sup>27</sup> See Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010).

<sup>28</sup> See Michael Ames, *Captive Market: Why We Won’t Get Prison Reform*, HARPER’S MAG., Feb. 2015, at 39.

<sup>29</sup> See Ronald F. Wright & Wayne A. Logan, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1177.

<sup>30</sup> See MODEL PENAL CODE: SENTENCING § 6.04(A)–(D) (AM. LAW INST., Tentative Draft No. 3, 2014).

<sup>31</sup> See *id.*

<sup>32</sup> See Colgan, *supra* note 23, at 285.

<sup>33</sup> See Wright & Logan, *supra* note 29, at 1177.

<sup>34</sup> See Colgan, *supra* note 23, at 283.

ticularly true when the offender ends up arrested, imprisoned, or further surcharged due to inability to pay the original administrative fees. All of this adds up to very real punishment for the offender, who may spend the rest of her life attempting to resolve these debts, both in and out of confinement.

### A. *The New Debtor's Prison*

When criminal justice debt cannot be paid, imprisonment often looms as punishment. The conditions in these modern debtors' prisons can be atrocious. The failure to pay criminal justice debts can be literally dangerous:

Once locked in the jails of Ferguson and Jennings, debtors endure grotesque, dungeon-like conditions. Human beings languish in cells covered in blood, mucus, and feces without access to soap, toothbrushes, toothpaste, laundry, medical care, exercise, adequate food, natural light, books, television, or legal materials. They are told that they will be kept in jail indefinitely unless they or their families come up with arbitrary and constantly changing amounts of money to buy their freedom.<sup>35</sup>

As the lawsuit challenging Ferguson's practice of jailing for criminal justice debt argued, these conditions of confinement would be unconstitutional for even the worst offenders under the Eighth Amendment's cruel and unusual punishment clause.<sup>36</sup>

Incarcerating the impoverished has a long and unsavory history in this country.<sup>37</sup> Since the early 1600s, private prisons have profited from the poor, with early English businessmen shipping and selling convicts to the Virginia settlements as servants.<sup>38</sup> Following the Revolutionary War, a couple of separate prisons arose to accommodate debtors. In addition, there were so many debtors imprisoned that they also usually had their own dedicated section within the regular jail.<sup>39</sup>

Congress formally abolished federal debtors' prisons in the 1830s, and a majority of states followed its lead by the 1870s.<sup>40</sup> Nonetheless, a form of debtor's prison still continues informally because state constitutional and statu-

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<sup>35</sup> *Shutting Down Debtors' Prisons*, EQUAL JUST. UNDER L., <http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/> (last visited Sept. 5, 2016) (providing an overview of the conditions warranting lawsuits brought by Equal Justice Under Law).

<sup>36</sup> Class Action Complaint at 42, *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. 2015) (No. 4:15-cv-253), 2015 WL 510270.

<sup>37</sup> See Ames, *supra* note 28, at 39.

<sup>38</sup> See *id.*

<sup>39</sup> See BRUCH H. MANN, *REPUBLIC OF DEBTORS* 85–89 (2002).

<sup>40</sup> See Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1628–29 (2015).



tory bans on imprisonment for debt usually have a crime exception.<sup>41</sup> As a result, most states do not prohibit jail time for noncommercial debts arising from criminal court involvement or failure to pay child support or alimony.<sup>42</sup>

In 1970, in *Williams v. Illinois*, the Supreme Court first addressed imprisonment for unpaid criminal justice debt.<sup>43</sup> The Court held that extending a prison term for an inability to pay criminal justice debt violated the Fourteenth Amendment's Equal Protection Clause.<sup>44</sup> A year later, in 1971, in *Tate v. Short*, the Supreme Court likewise held that it was unconstitutional to "impos[e] a fine as a sentence and then automatically convert[] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."<sup>45</sup>

In 1983, the Supreme Court finally eliminated debtor's prison in *Bearden v. Georgia*, holding that imprisoning a probationer who was unable to pay off his legal debts violated the Equal Protection Clause.<sup>46</sup> The *Bearden* ruling was quite narrow, concluding that an offender could be sentenced to imprisonment if he had the money and was "willfully" refusing to pay.<sup>47</sup> This left the question of an offender's ability to pay in the hands of judges, with predictably arbitrary results.<sup>48</sup>

Part of the problem is that many, if not most, defendants do not know they may ask for a *Bearden* hearing. A *Bearden* hearing determines an offender's ability to pay and is supposed to come with representation of counsel.<sup>49</sup> Judges rarely inform offenders sua sponte about their *Bearden* hearing right,<sup>50</sup> however, likely because the hearing is time-consuming, slowing down the processing of the case. Instead, some courts have initiated what is called a "fines or time" sentence, which requires defendants to choose between either paying a fine or serving a set time in jail.<sup>51</sup> If the defendant cannot pay, then she automatically ends up in jail.

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<sup>41</sup> See *id.* at 1629.

<sup>42</sup> See *id.*

<sup>43</sup> *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970).

<sup>44</sup> See *id.* at 240–42.

<sup>45</sup> *Tate v. Short*, 401 U.S. 395, 398 (1971) (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)) (internal quotation marks omitted).

<sup>46</sup> See *Bearden v. Georgia*, 461 U.S. 660, 668–69, 672–73 (1983).

<sup>47</sup> See *id.* at 672.

<sup>48</sup> See Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/V5GS-S54Q>].

<sup>49</sup> See Eric Balaban, *Shining a Light into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275, 286 (2014).

<sup>50</sup> See Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [<https://perma.cc/T5WU-W3CP>].

<sup>51</sup> See Balaban, *supra* note 49, at 286.

Another way that courts avoid *Bearden* hearings is by imposing the payment plan as part of a guilty plea. Because *Bearden* addressed a case where the trial court sentenced the defendant, some courts have created a *Bearden* “exception” situation where the defendant affirmatively agrees to pay her debt as part of a plea bargain agreement.<sup>52</sup> In this way, courts can exempt plea bargains from the *Bearden* mandate since the original *Bearden* defendant went to trial.

There is no persuasive reason, however, to treat plea-bargained probation terms differently than judge-imposed probation terms, particularly because the vast majority of criminal indictments today are disposed of by guilty pleas.<sup>53</sup> Allowing any courts to avoid the *Bearden* mandate would allow *Bearden* to be entirely cannibalized by this dubious plea bargain “exception.”

Once a criminal justice debt is imposed, it is difficult for a judge to modify the amount owed, even when the offender cannot pay due to reasons beyond her control.<sup>54</sup> An offender cannot discharge a criminal justice debt through bankruptcy court, nor avoid the potential interest imposed or collection fees for overdue payments.<sup>55</sup> Accordingly, a very real version of debtors’ prison lives on in the twenty-first century. By attempting to squeeze revenue from the poorest of offenders, our criminal justice system has created, in essence, a new version of imprisonment for debt, with worrisome human costs.<sup>56</sup>

In the shadowy netherworld of cash register justice, criminal process is greatly detached from our core legitimating precept of community adjudication and punishment—a critical part of our adversarial system and an essential Sixth Amendment right. This distance can be attributed to the “structural erosion”<sup>57</sup> present in many areas of the criminal system, all of which delegitimizes the meaning of criminal justice. Such structural erosion occurs both before and after adjudication, and so far has been “radically underdocumented.”<sup>58</sup>

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<sup>52</sup> See *United States v. Johnson*, 767 F.Supp. 243, 248 (N.D. Ala. 1991) (distinguishing *Bearden* on the grounds that “restitution obligations were carefully bargained for after notice to the victims”); *Dickey v. State*, 570 S.E.2d 634, 636 (Ga. Ct. App. 2002) (holding that *Bearden* does not apply to negotiated plea-bargain probation terms); *Gamble v. Commonwealth*, 293 S.W.3d 406, 411–13 (Ky. Ct. App. 2009) (distinguishing *Bearden* on the grounds that the defendant “knowingly and voluntarily entered his plea of guilty wherein he undertook to make child support payments in exchange for a conditional discharge”); Ann K. Wagner, *The Conflict Over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors’ Prison*, 2010 U. CHI. LEGAL F. 383, 386.

<sup>53</sup> See Wagner, *supra* note 52, at 388, 402.

<sup>54</sup> See Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUST. 963, 965 (2013).

<sup>55</sup> See *id.*

<sup>56</sup> See Balaban, *supra* note 49, at 276.

<sup>57</sup> See Natapoff, *supra* note 26, at 1318. Natapoff makes this point specifically about how misdemeanors are treated in the criminal justice system, but it is more broadly applicable to criminal justice debt in general.

<sup>58</sup> See *id.* at 1320.

As detailed in Part I, Section B, this underreported world of abusive fees and fines imposes tremendous costs. This largely unacknowledged area has been so neglected because of the tendency to overlook any punishment resulting from minor crimes, focusing instead primarily on major felonies.<sup>59</sup> What follows illustrates the need for a hard look at *every* type of punishment imposed in the criminal justice system.

### *B. The Labyrinth of Criminal Justice Debt*

The array of criminal justice costs, fines, fees, restitution, surcharges, and interest can be staggering. It seems that every actor even tangentially related to the criminal justice system has her hand out for recompense. The list of economic sanctions seems both endless and expanding, limited only by the creativity of court officials, judges, correction boards, private probation companies, and legislatures.

A major problem with the regime of financial punishment is the imposition of these with virtually “no attention paid to the defendant’s circumstances, including the extraordinarily severe consequences that often result for individuals, their families, and society at large.”<sup>60</sup> Below, this Section provides a detailed taxonomy of the most frequent forms of criminal justice debt imposed by local counties and states.

#### 1. Pre-Trial: Entering the Labyrinth

##### *a. Booking Fees*

The complex world of financial sanctions begins at the entry to the criminal justice system, the arrest. Often, a request for payment is made shortly following arrest before an indictment is even obtained.<sup>61</sup> These types of “booking fees” are often based only on a police finding of probable cause.<sup>62</sup>

Courts are divided over the constitutionality of booking fees. In 2014, in *Markadonatos v. Village of Woodridge*, the U.S. Court of Appeals for the Seventh Circuit held that these types of fees were constitutional under both procedural and substantive due process because booking fees are imposed on all arrestees, whether or not the arrest was supported by probable cause.<sup>63</sup>

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<sup>59</sup> Recently there has been increased interest in minor crimes, including work by Josh Bowers, Beth Colgan, Alexandra Natapoff, Issa Kohler-Hausmann, Jenny Roberts, and Jocelyn Simonson. As a whole, however, most of the focus of the criminal justice system, by scholars, practitioners, journalists, and policy-makers, has been on felonies.

<sup>60</sup> Colgan, *supra* note 23, at 281.

<sup>61</sup> See Wright & Logan, *supra* note 29, at 1178.

<sup>62</sup> See *id.* at 1211.

<sup>63</sup> See *Markadonatos v. Village of Woodridge*, 739 F.3d 984, 986–87 (7th Cir. 2014).

The dissent in *Markadonatos*, however, characterized the disputed booking fee as a “criminal fine,” despite its modesty (thirty dollars).<sup>64</sup> Judge David Hamilton argued that the booking fee was facially unconstitutional because it took property from all arrestees, whether found guilty or innocent, without due process of law—in fact, without any criminal procedure at all.<sup>65</sup> Specifically, Judge Hamilton contended that under the balancing test established by the Supreme Court in *Mathews v. Eldridge* in 1976, any booking fee can only be levied following criminal prosecution because it is a criminal fine and, therefore, punishment.<sup>66</sup>

Following Judge Hamilton’s logic, then, booking fees are unconstitutional for two reasons. First, an individual’s private interest in his property, including money, is constitutionally protected, even for very small amounts.<sup>67</sup> Second, the possibility of mistaken deprivation is quite large, as the arrest is the only subjective decision that necessitates the fine.<sup>68</sup> At least thirty percent of people who are arrested are never charged or convicted but are still charged criminal fines, with no possibility of having the money returned.<sup>69</sup> Such imposition of punishment without process is a constant theme in the world of criminal justice debt.

In addition, the imposition of booking fees, like the other financial sanctions levied pre-conviction, violates an offender’s basic rights to have her punishment determined by some aspect of the community. Punishment can only be properly determined through criminal process<sup>70</sup> and is not fulfilled by the officer’s mere determination that there is probable cause to arrest. In other words, no government entity may impose a criminal fine based only on probable cause, as this imposes the punishment before the verdict.<sup>71</sup>

Similar reasoning regarding the unconstitutionality and punitive nature of booking fees was applied in two recent district court opinions, one from Ohio and one from Illinois.<sup>72</sup> In 2002, in *Allen v. Leis*, the U.S. District Court for the Southern District of Ohio held that a county jail’s policy of appropriating cash for their standard booking fee upon a pre-trial detainee’s arrival violated due process.<sup>73</sup> Following state law, Hamilton County charged a small booking fee

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<sup>64</sup> *Id.* at 993, 1000 (Hamilton, J., dissenting).

<sup>65</sup> *See id.* at 993.

<sup>66</sup> *See id.* at 994 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 994, 998.

<sup>70</sup> *See id.* at 996.

<sup>71</sup> *Id.* at 997.

<sup>72</sup> *See* *Roehl v. City of Naperville*, 857 F. Supp. 2d 707, 717 (N.D. Ill. 2012); *Allen v. Leis*, 213 F. Supp. 2d 819, 832–34 (S.D. Ohio 2002).

<sup>73</sup> *Allen*, 213 F. Supp. 2d at 832–34.

to every arrested offender detained in county jail.<sup>74</sup> This fee could theoretically be recovered if the criminal charges were dismissed or the offender was acquitted.<sup>75</sup> Nonetheless, the court found that since every pretrial detainee had to pay with her immediate funds, the county took her currency without proper notice or hearing.<sup>76</sup> Accordingly, the booking fee violated due process.<sup>77</sup>

Likewise, in 2012, in *Roehl v. City of Naperville*, the U.S. District Court of the Northern District of Illinois held that imposing an administrative fee for processing arrests violated procedural due process.<sup>78</sup> In this case, the city of Naperville, IL charged a fifty-dollar administrative fee for the processing of bail, bond, or any bookable arrest, including any arrest on a warrant.<sup>79</sup> The court held that because the Naperville booking fee ordinance failed to provide any procedural mechanism addressing the proper imposition of the fee, the sanction violated procedural due process.<sup>80</sup>

Accordingly, examining these introductory fees yields two important lessons. First, even though these booking fees can be very small, their automatic imposition is unconstitutional for procedural due process reasons. Second, there are very real Sixth Amendment rights invoked as well. Any financial sanction imposed before conviction or the adjudication of punishment cannot stand, as this usurps the role of the jury and community, a role specifically reserved under the Sixth Amendment jury trial right.

### *b. Bail “Administrative” Fees*

Several states and local counties have added “administrative” fees to money bail, collecting them from either bail bondsmen or indicted offenders, even following an acquittal.<sup>81</sup> In California, for example, there are numerous fees and payments added on to an offender’s bail amount, including a “penalty assessment” which charges twenty-nine dollars for every ten dollars of the base bail amount.<sup>82</sup> In addition to that, California also imposes a twenty percent state surcharge on an offender’s base bail or base fine amount.<sup>83</sup> These financial penalties can rapidly compound.

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<sup>74</sup> See *id.* at 820.

<sup>75</sup> See *id.* at 821.

<sup>76</sup> See *id.* at 832.

<sup>77</sup> See *id.* at 832–34.

<sup>78</sup> *Roehl*, 857 F. Supp. 2dat 717.

<sup>79</sup> *Id.* at 709.

<sup>80</sup> See *id.* at 717.

<sup>81</sup> See Wright & Logan, *supra* note 29, at 1189.

<sup>82</sup> See CAL. GOV’T CODE §§ 76000, 76000.5, 70372, 76104.6, 76104.7 (West 2015); CAL. PENAL CODE § 1464 (West 2007).

<sup>83</sup> See CAL. PENAL CODE § 1465.7.

Likewise, in Worcester, Massachusetts, all offenders who decide to post bail to be released from pre-trial incarceration must also pay a forty dollar “bail administrative fee,” which is required to be in all cash.<sup>84</sup>

Pre-trial releasees can rack up yet more costs when they are required to fund their own pretrial supervision, whether it is run by the state or by private entities,<sup>85</sup> as described in more detail below. Moreover, a majority of states (about two-thirds in all) permit prosecutors to charge suspects while they are being monitored during deferred prosecution programs.<sup>86</sup>

These sorts of “[d]emands for payment at a point so early in the process, when institutional oversight is weak, threaten the presumption of innocence . . . [and] raise equal justice concerns.”<sup>87</sup> Of equal concern, these sorts of extremely early compensatory demands also implicate Sixth Amendment jury trial rights, since these financial sanctions are imposed before conviction (which sometimes never comes), thus entirely bypassing the role of the community jury in adjudicating guilt and punishment.

### *c. Dismissal Fees*

Local jurisdictions have begun to permit some minor offenders to eliminate their charges by remitting payment to either the police or the courts.<sup>88</sup> This sum results in the dismissal of the charge and prevents any conviction from appearing on the record.<sup>89</sup> Of course, this practice privileges the rich and disadvantages the poor, who often do not have enough money available to buy off their misstep.

Although there has always been a gulf between justice for the poor and justice for the wealthy, institutionalizing it through the purchasing of a clean record seems deeply unfair. Even more troubling, these pre-trial abatement payments, such as the “post and forfeit” policy used in the District of Columbia, and the “prosecution cost” policy in Minnesota, can be seen as government extortion.<sup>90</sup> There is much that smacks of unsavory behavior in the world of criminal justice debt.

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<sup>84</sup> See *Posting Bail*, WORCESTER COUNTY SHERIFF’S OFFICE, <http://worcestercountysheriff.com/facility/posting-bail/> [https://perma.cc/2723-PL2S] (last visited Sept. 4, 2016).

<sup>85</sup> See Wright & Logan, *supra* note 29, at 1189.

<sup>86</sup> See *id.* at 1187.

<sup>87</sup> See *id.* at 1178.

<sup>88</sup> See *id.* at 1188.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* at 1211.

#### *d. Public Defender Application Fees*

Once an offender is formally indicted, financial sanctions proceed unabated. One relatively new development in criminal justice debt is public defender application fees, charged for simply *applying* to use a public defender.<sup>91</sup> Somewhat ironically, the fees are charged automatically to indigent criminal defendants despite their proven poverty.<sup>92</sup> These impecunious offenders are expected to pay as they go, whether or not they are ever convicted of an offense.<sup>93</sup>

Currently a variety of states utilize application fees, with costs ranging from \$10 to \$480.<sup>94</sup> For example, Newark, New Jersey recently quadrupled its public defender application fee from \$50 to \$200.<sup>95</sup> Thus, impoverished defendants are put in a true bind—either come up, somehow, with the money to pay the fee or forego even the possibility of counsel. Although some states have statutorily provided hardship waivers for the application fees, often defendants are not actually notified of these waivers.<sup>96</sup>

In addition, if an offender cannot pay her application fee at the end of her case, then several states use creative means to extract payment, including garnishing wages, property seizure, impoundment of vehicles, required community service, potential revocation of probation, and potential sentence enhancement.<sup>97</sup> Thus, these public defender application fees—monies extracted from the very poorest of defendants for entry into the criminal justice system—are a direct repudiation of the spirit of the Supreme Court's 1963 decision in *Gideon v. Wainwright*.<sup>98</sup> Moreover, these assessments provide a terrible message to send to the public about our criminal justice system: that justice can be had but only for a price.

#### *e. Private Probation*

When an offender is indicted, many private actors in the criminal justice system start calculating their profits. Private probation firms make independent

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<sup>91</sup> See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046 (2006).

<sup>92</sup> See *id.*

<sup>93</sup> See *id.* at 2054.

<sup>94</sup> See *id.* at 2052–53.

<sup>95</sup> See E. Tammy Kim, *Poor Clients Pay Fees Just to Apply for a Public Defender*, AL JAZEERA AM. (Jan. 9, 2015), <http://america.aljazeera.com/articles/2015/1/9/poor-defendants-payfeesjusttoapplyforapublicdefender.html> [<https://perma.cc/RQ39-AYJL>].

<sup>96</sup> See BANNON ET AL., *supra* note 14, at 12 (discussing the actual practice in Arizona).

<sup>97</sup> See Wright & Logan, *supra* note 91, at 2053–54 (discussing practices in Delaware, Minnesota, and beyond).

<sup>98</sup> See *generally* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that impoverished defendants have a right to appointed counsel).

government contracts with the government to provide probation services,<sup>99</sup> which often functions in lieu of a sentence for many offenders. In Georgia, for example, numerous private, for-profit companies pile on extra fees such as “enrollment” costs and other surcharges for the privilege of probation.<sup>100</sup> Such fees can be more than the original costs levied on the defendant.<sup>101</sup>

Likewise, in Alabama and Mississippi, even those offenders who have paid off their original criminal debts are still under threat of jail time due to fees and interest payments imposed by private, for-profit companies.<sup>102</sup> These private providers also have been known to game the process to create extra costs, such as insisting that defendants serve their sentences consecutively, not concurrently.<sup>103</sup>

Private probation firms have a number of ways to extract revenues from released offenders. They provide GPS devices to keep track of both probationers and parolees for a contracted fee, payable by the defendant. In addition, such firms help oversee community service requirements and halfway houses, the latter of which often requires purchase of an insurance policy from a private actor for the duration of the defendant’s stay.<sup>104</sup>

Often counties and states also subcontract the collection of supervision-related tariffs imposed by the courts. This permits the private firms to tack on significant additional levies to the court-imposed fees.<sup>105</sup> Local governments and courts rarely monitor these private firms, making them free to impose fees and fines in a largely unregulated manner.<sup>106</sup>

In the face of potential sentencing reforms on both the state and federal level, which might potentially eat into profit, many private prison companies have diversified into probationary and parole supervision. For example, in 2013, Corrections Corporation of America acquired Correctional Alternatives, a correction company that provides housing and rehabilitative services such as “work furloughs, residential re-entry programs, and home confinement.”<sup>107</sup>

<sup>99</sup> See Wright & Logan, *supra* note 29, at 1193, 1214.

<sup>100</sup> See *id.* at 1214.

<sup>101</sup> See *id.*

<sup>102</sup> See Nicole Flatow, *How Private Companies Are Profiting from Threats to Jail the Poor*, THINKPROGRESS (Feb. 6, 2014), <https://thinkprogress.org/how-private-companies-are-profiting-from-threats-to-jail-the-poor-29cbe52e6e73#.62ps25luv> [<https://perma.cc/8FX2-QTW7>].

<sup>103</sup> See Nicole Flatow, *Georgia’s Top Court Reins in Private Probation Firms for Illegally Extending Sentences*, THINKPROGRESS (Dec. 1, 2014), <https://thinkprogress.org/georgias-top-court-reins-in-private-probation-firms-for-illegally-extending-sentences-3827ce2e1719#.1s24jc7nx> [<https://perma.cc/SYTT-QHTQ>].

<sup>104</sup> See Wright & Logan, *supra* note 29, at 1193.

<sup>105</sup> See *id.*

<sup>106</sup> See Flatow, *supra* note 102.

<sup>107</sup> See Matt Stroud, *What Private Prisons Companies Have Done to Diversify in the Face of Sentencing Reform*, BLOOMBERG BUS. (May 12, 2015), <http://www.bloomberg.com/news/articles/>



Similarly, in 2011, the GEO Group acquired Behavioral Interventions, which is the world's largest producer of monitoring equipment for people awaiting trial or serving out probation or parole sentences<sup>108</sup> Likewise, in 2009, the GEO Group acquired JustCare, a medical and mental health service provider.<sup>109</sup> Clearly the for-profit prison industry has determined that the fees, fines, and costs connected to the criminal justice system are a growth industry. So far, they have not been proven wrong.

## 2. During Adjudication—Getting Lost in the Maze

### a. Court Fees

State and local courts have increasingly required payment for the privilege of undergoing criminal process. Since 2010, forty-eight out of fifty states have increased criminal court fees.<sup>110</sup> These fees range from the petty to the severe and have had a serious impact on poor defendants.

For example, offenders can be billed for the cost of a public defender in at least forty-three states and the District of Columbia.<sup>111</sup> Following conviction, state legislatures reach into the pockets of impoverished defendants by passing recoupment statutes, which recover part or all of the public defender attorney's fees from the offenders themselves.<sup>112</sup> These reimbursement fees can have costs that go into the thousands.<sup>113</sup> In other words, an indigent offender is often required to pay back up to the full cost of representation after her case is over.<sup>114</sup> As a result, poor defendants either skip using an attorney or carry the debt for years.<sup>115</sup>

In addition, local courts have become quite creative in inventing various court fees. One court in Texas charged a \$250 "DNA record fee," the result of which was split between the highway fund and the general fund for criminal justice planning.<sup>116</sup> Although the Supreme Court of Texas found this specific

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2015-05-13/what-private-prisons-companies-have-done-to-diversify-in-the-face-of-sentencing-reform [https://perma.cc/Q386-JCC6].

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See* Shapiro, *supra* note 48.

<sup>111</sup> *See id.*

<sup>112</sup> *See* Wright & Logan, *supra* note 91, at 2046.

<sup>113</sup> *See* Shapiro, *supra* note 48.

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See* Emily DePrang, *Houston Attorney Crusading Against 'Unconstitutional' Court Fees*, TEX. OBSERVER (Mar. 4, 2015), <https://www.texasobserver.org/houston-attorney-crusading-against-unconstitutional-court-fees/> [https://perma.cc/4DEV-DRW9].

fee unconstitutional,<sup>117</sup> repeated usage of very similar fees in various states shows how determined courts can be in extracting money from offenders.

Offenders are charged fees to have their DNA samples collected and for their own arrest warrants.<sup>118</sup> In Washington state, offenders are even charged a fee for jury trial: a twelve-person jury trial comes to \$250, double the charge for a six-person jury.<sup>119</sup> Likewise, in Oklahoma, the fees billed defendants in simple misdemeanor cases can rise as high as one thousand dollars.<sup>120</sup> For an impoverished offender, these simple sums are often simply not repayable, frequently leading to re-incarceration for failure to pay court debt.

Court fees have become so onerous that the Washington state American Civil Liberties Union (“ACLU”) filed a class-action lawsuit alleging that jailing defendants for failure to pay court fees is unconstitutional.<sup>121</sup> Specifically, the ACLU argued that the “policy disproportionately targets and punishes the poor, creates a revolving door of incarceration and is a violation of the U.S. Constitution.”<sup>122</sup> The suit requested other alternatives besides jail for unpaid court fees, like a community service option, longer extensions for payments, or the waiving of fees altogether.<sup>123</sup> The lawsuit was filed on behalf of three former inmates, all of whom were jailed after failing to make payments during unemployment.<sup>124</sup> Unfortunately, the conditions alleged by the lawsuit are far too common in today’s world of cash register justice; those without ready money are often imprisoned for failure to pay court debt.

### *b. Disability and Translation Fees*

For those who cannot see, hear, speak, or otherwise navigate a courthouse, or for those with emotional and cognitive challenges that make it difficult for them to participate in their own cases, access to justice depends on support from the justice system. Many states, however, impose financial demands on disabled defendants in order for them to fully understand their own

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<sup>117</sup> See *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986) (“Nearly all states with similar open courts provisions have held that filing fees that go to fund general welfare programs, and not court-related services, are unconstitutional.”).

<sup>118</sup> See Shapiro, *supra* note 48.

<sup>119</sup> See *id.*

<sup>120</sup> See Associated Press, *Oklahoma Court Filing Fees Challenged as Unconstitutional*, CLAIMS J. (Oct. 13, 2009), <http://www.claimsjournal.com/news/southcentral/2009/10/13/104477.htm> [<https://perma.cc/Q7GG-U6TQ>].

<sup>121</sup> See Tyler Richardson, *ACLU Sues Benton County Over Jail Sentences for Unpaid Court Fees*, TRI-CITY HERALD (Kennewick, Wash.) (Oct. 6, 2015), <http://www.tri-cityherald.com/news/local/crime/article37968666.html> [<https://perma.cc/FEY7-BSJ9>].

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

legal proceedings. For example, approximately twelve percent of all states allow courts to charge a deaf or hearing-impaired defendant for the cost of a sign-language interpreter.<sup>125</sup>

Similarly, individuals with limited English proficiency often have to pay for translators. In North Carolina, for example, indigent defendants are often assessed interpreter fees, which are included in the “court costs.”<sup>126</sup> This is despite the United States Department of Justice’s (“DOJ”) 2010 issuance of a letter requiring interpreters be provided in all court proceedings—at the county’s expense—in courts receiving federal funds.<sup>127</sup> According to the DOJ, any court receiving federal funds needs to provide interpretation free of cost.<sup>128</sup> Since the DOJ’s advisory letter, however, several states have run afoul of this prohibition, including Alaska, Arkansas, Indiana, Florida, Louisiana, Nevada, Oklahoma, Tennessee, and Utah,<sup>129</sup> and until very recently, California.<sup>130</sup> Requiring those with physical disabilities or language impediments to pay for their own court translators is just another way in which the criminal justice system transfers costs to impoverished offenders. To require a defendant to pay in order to simply understand the charges leveled against her is the epitome of cash register justice.

### 3. Post-Conviction: Fighting the Minotaur

The fees, fines, and costs that have become an integral part of criminal justice do not end upon conviction. In fact, conviction is typically the point at which criminal justice debt really begins to increase. Once an offender is convicted, court systems do not hesitate to impose multiple financial sanctions.

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<sup>125</sup> See Nat’l Ctr. for Access to Justice at Fordham Law Sch., *Disability Access: Support for People with Disabilities*, JUST. INDEX, <http://justiceindex.org/2016-findings/disability-access/> [https://perma.cc/MH9M-ZGB8] (last visited on Sept. 5, 2016).

<sup>126</sup> See EMILY KIRBY, SARAH LONG, SONAL RAJA, & DEBORAH M. WEISSMAN, AN ANALYSIS OF THE SYSTEMIC PROBLEMS REGARDING FOREIGN LANGUAGE INTERPRETATION IN THE NORTH CAROLINA COURT SYSTEM AND POTENTIAL SOLUTIONS 2 (2010), <http://www.law.unc.edu/documents/clinicalprograms/foreignlanguageinterpretationproblemsnc.pdf> [https://perma.cc/XDF6-7QFQ].

<sup>127</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Chief Justices/State Court Adm’rs (Aug. 16, 2010), [http://www.lep.gov/final\\_courts\\_ltr\\_081610.pdf](http://www.lep.gov/final_courts_ltr_081610.pdf) [https://perma.cc/NQJ9-4R9C].

<sup>128</sup> See *id.*

<sup>129</sup> See LAURA ABEL, BRENNAN CTR. FOR JUSTICE, LANGUAGE ACCESS IN STATE COURTS 34 n.7 (2009), <https://www.brennancenter.org/sites/default/files/legacy/Justice/LanguageAccessinStateCourts.pdf> [https://perma.cc/TNY9-6TTC].

<sup>130</sup> See Associated Press, *California Moves to Provide Free Interpreter Services in All Court Cases*, CBS SFBAYAREA (Aug. 16, 2015), <http://sanfrancisco.cbslocal.com/2015/08/16/california-court-interpreters-civil-cases/> [https://perma.cc/E3E9-TDGY].

### a. Jail and Prison Fees

The recent proliferation of jail and prison fees has been a major financial strain on convicted offenders.<sup>131</sup> In forty-one states, inmates are charged room and board fees to stay in jail or prison.<sup>132</sup> Through “pay-to-stay” programs, offenders incarcerated in state and county jails are financially responsible for their room and board along with every other possible cost related to their stay.<sup>133</sup> For example, in Macomb County, Georgia, the county jail bills prisoners for room and board, physicals, dental visits, medication, prescriptions, nurse sick calls, hospital medical treatment, and even work-release, often at exorbitant rates.<sup>134</sup>

“Pay-to-stay” programs have colonized prisons and jails, increasing revenues for counties and local governments. Generally speaking, there are three different models of pay-to-stay programs: “per-diems,” itemized charging, and upgrades.<sup>135</sup> “Per-diems” are where the state or county charge a daily room-and-board fee, with penalties ranging from ten dollars to \$142.42 per day (the latter more than many local hotels).<sup>136</sup> Itemized charging involves charging inmates for individual necessities such as toilet paper, clothing, meals, and doctor or dental visits, necessities that incarcerated defendants—the ultimate captive audience—obviously cannot provide on their own.<sup>137</sup> Upgrades, on the other hand, are usually fancier accommodations for wealthy offenders who do not wish to serve their time within the spartan confines of the standard county jail.<sup>138</sup> When jails and prisons differentiate between standard and upgraded incarceration, the inmates who can only afford the standard experience often get short shrift by corrections officials, who often focus on the upgraded experience, which raises far more revenue.<sup>139</sup>

<sup>131</sup> See Adam Serwer, *Headed to Prison? Beware: Debt Is the New Black*, MSNBC (Sept. 13, 2013), <http://www.msnbc.com/msnbc/headed-prison-beware-debt-the-new> [<https://perma.cc/ZS9Y-KG36>].

<sup>132</sup> See Shapiro, *supra* note 48.

<sup>133</sup> See Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 58–59 (2013).

<sup>134</sup> See Eisen, *supra* note 18, at 319.

<sup>135</sup> See *id.* at 324–26.

<sup>136</sup> See *id.* at 325.

<sup>137</sup> See *id.* at 325–26. Granted, many states have waiver systems that permit these fees to be waived on findings of indigency or lack of funds in inmate bank accounts, but often these waivers are hard to obtain. See *id.* at 326.

<sup>138</sup> See *id.* To qualify for such upgraded accommodations, the crime committed must be minor. See *id.*

<sup>139</sup> See Jennifer Steinhauer, *For \$82 a Day, Booking a Stay in a Five-Star Jail*, N.Y. TIMES (Apr. 29, 2007), <http://www.nytimes.com/2007/04/29/us/29jail.html> [<https://perma.cc/5QRJ-B7R5>] (“You have to be in the know to even apply for entry, and even if the court approves your sentence there, jail administrators can operate like bouncers, rejecting anyone they wish.”); see also Claire Groden, *Want a Jail Cell Upgrade? That’ll Be \$155 a Night*, TIME (Jul. 31, 2013), <http://newsfeed.time.com/2013/>

States and counties have become so aggressive about recouping room and board fees that some have turned to suing released offenders for the estimated cost of their stay. For example, in November 2015 the Illinois Department of Corrections sued a released prisoner for a room and board bill totaling almost \$20,000 to recoup his imprisonment costs.<sup>140</sup> Although some of these corrections-driven recovery lawsuits go after offenders who have committed serious or violent crimes, other suits target those who have come into a modest sum of money, even when convicted of less serious crimes.<sup>141</sup> Such lawsuits make it much harder for parolees to return to a normal life post-prison (and thus avoid recidivism), as they often leave offenders destitute.

Charging for room and board, however, is only the beginning of jail and prison fees. Take prison phone calls as an illustrative example. Prison-phone companies and the prison-wire transfer companies that are following suit garner their revenues directly from inmates and their families—usually charging fifteen dollars for a fifteen minute phone call.<sup>142</sup> Forty to sixty percent of these costs are kicked back to the contracting government agency—and roughly eighty-five percent of non-federal jails sign up for such commission-added contracts.<sup>143</sup> Nickel and diming prisoners for their basic communicatory needs may be profitable but unquestionably increases criminal justice debt.

Therefore, even serving one's standard, designated time in a county jail or state prison can lead to an impoverished offender racking up criminal justice debt. The problem of financial debt is so great that sometimes inmates will go without standard hygiene items or even medical treatment to minimize the accrual of financial sanctions.<sup>144</sup>

The imposition of monetary penalties upon jailed offenders for participating in work release programs is also quite common. Many jurisdictions require inmates permitted to take part in work release (where the offender works during the day then returns at night to the jail) remit part of their earnings to the jail, to offset costs.<sup>145</sup>

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07/31/want-a-jail-cell-upgrade-thatll-be-155-a-night/ [https://perma.cc/6NMH-37NZ] (describing the “pay-to-stay upgrades” offered to the few who can afford them).

<sup>140</sup> See Steve Mills & Todd Lighty, *State Sues Prisoners to Pay for Their Room, Board*, CHI. TRIB. (Nov. 30, 2015), <http://www.chicagotribune.com/news/ct-prison-fees-lawsuits-met-20151129-story.html> [https://perma.cc/RQY7-9QES].

<sup>141</sup> See *id.*

<sup>142</sup> See Ames, *supra* note 28, at 41–42.

<sup>143</sup> See *id.* at 42.

<sup>144</sup> See Pat Nolan, *Inmate User Fees: Fiscal Fix or Mirage*, CORRECTIONS TODAY, Aug. 2003, at 23, available at <http://www.thefreelibrary.com/Inmate+user+fees%3A+fiscal+fix+or+mirage%3F-a0121939154> [https://perma.cc/6RNJ-TUUS].

<sup>145</sup> See Plunkett, *supra* note 133, at 60.

For those inmates who cannot pay as they go, these debts can linger well after the sentence has been served, turning correction officials into bailiffs when they attempt to recover payment.<sup>146</sup> When standard collection fails, states and counties sometimes turn to private collection agencies and bill the agency usage fee to the defendant, adding the cost to whatever else she owes.<sup>147</sup>

Once an offender is released, her sentencing court is often required or has the option to make reimbursement a condition of supervised release, whether this is parole or probation.<sup>148</sup> This means that if an offender fails to repay her incarceration debt, she can be returned to jail for violating a condition of probation or parole.

At least one federal appellate court has found that these types of inmate financial sanctions are very similar to fines.<sup>149</sup> In 2000, in *Tillman v. Lebanon County Correctional Facility*, the U.S. Court of Appeals for the Third Circuit stated that such fees could be considered fines, which by definition are more punitive in nature.<sup>150</sup> Granted, the *Tillman* court found that even if treated as a fine, the Pennsylvania Cost Recovery Program at issue was not excessive under the Eighth Amendment Excessive Fines Clause because it was technically not punitive in design; the fees in that particular program were designed to teach financial responsibility.<sup>151</sup> Even so, the *Tillman* court acknowledged that other types of fines could be interpreted as punitive despite a purely rehabilitative intent on the part of its creators.<sup>152</sup>

This understanding is important because many of these inmate fee programs are usually partly punitive in intent. The creators of such programs have been upfront about these intents, commenting that the fees teach inmates valuable lessons as part of their punishment.<sup>153</sup> The lessons taught, however, all too often result in penury and re-incarceration.

### *b. Statutory Penalties*

Post-conviction, many fines are statutorily based on general categories of crime, with most jurisdictions providing a range of possibilities for the amount of the fine.<sup>154</sup> A variety of jurisdictions apply surcharges in addition to the fine,

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<sup>146</sup> See *id.* at 76–77.

<sup>147</sup> See *id.* at 79. Naturally, the private market has found a way to extract revenue from these programs, with some private companies demanding 30% of the offender's payment to help collect the monies. See *id.* at 77–78.

<sup>148</sup> See *id.* at at 80.

<sup>149</sup> See *Tillman v. Lebanon Cty. Corr. Facility*, 221 F.3d 410, 420 (3d Cir. 2000).

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See Eisen, *supra* note 18, at 323.

<sup>154</sup> See Colgan, *supra* note 23, at 285.

either a percentage or a flat fee, thus increasing the fine amount right at the outset.<sup>155</sup> Other payments are tightly tied to the circumstances of the crime committed or harm suffered by the victim, such as restitution.

Money and property forfeiture comprise a separate category from fines and restitution and are tied closely to certain crimes or even merely suspected offenses.<sup>156</sup> Such forfeiture can include not only crime proceeds but also cash or property in which an offender (or someone related to the offender) maintains legitimate ownership interests.<sup>157</sup>

### *c. Post-Conviction Levies*

Following conviction, a majority of courts levy costs against convicted offenders, and a large number of states have legislation mandating assessments after conviction.<sup>158</sup> These sanctions are usually tied to court system administration, to assist funding the justice, punishment, and collection system.<sup>159</sup> The post-conviction levies can include repayment for a broad swath of standard criminal justice activities such as investigations, prosecutor's trial preparation, preparing arrest warrants, and even seating a criminal jury.<sup>160</sup> Due to difficult financial times, fees have increased dramatically since 2000 as a way to literally support the criminal court system.<sup>161</sup> Post-conviction costs can be so all-encompassing that sometimes they exceed the economic sanctions originally tied to the crime.<sup>162</sup>

Such cost assessments are often combined with other payments required by the government to help fund punitive sanctions. Fees are commonly imposed for incarceration costs both before and after trial.<sup>163</sup> For example, costs are charged by most states to the offender during her registration for convicted sex offender status.<sup>164</sup> Additionally, laboratory services associated with drug crimes are often levied on offenders.<sup>165</sup> If an offender is unable to pay any of these fees, fines or assessments, often she is returned to jail, which imposes extra punishment than that envisioned by the courts, the jury, or the legislature.

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<sup>155</sup> *See id.*

<sup>156</sup> *See id.* at 285–86.

<sup>157</sup> *See id.* at 286.

<sup>158</sup> *See* Wright & Logan, *supra* note 29, at 1190.

<sup>159</sup> *See* Colgan, *supra* note 23, at 286.

<sup>160</sup> *See id.*

<sup>161</sup> BANNON ET AL., *supra* note 14, at 4–5.

<sup>162</sup> *See* HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 3 (2014). *See generally* BANNON ET AL., *supra* note 14 (exploring the proliferation of "user fees" post-conviction).

<sup>163</sup> *See* Colgan, *supra* note 23, at 287.

<sup>164</sup> *See* Wright & Logan, *supra* note 29, at 1191.

<sup>165</sup> *See id.*

#### d. Criminal Restitution

Criminal restitution is also another way to ransack the pockets of offenders. Recently, courts have been ordering defendants to compensate victims for a growing category of losses, including economic, emotional and psychological losses, as well as losses for which the defendant was not even found guilty.<sup>166</sup> Criminal restitution, like all of the other fees, fines, and costs levied on an offender, is not afforded any constitutional protections.<sup>167</sup> In contrast, many courts entirely disavow the punitive nature of criminal restitution, characterizing it instead as “solely compensatory.”<sup>168</sup>

Understanding restitution as primarily compensatory, not punitive, has persisted. This understanding is despite frequent imposition of punitive criminal restitution due in large part to the booming victim’s rights movement.<sup>169</sup> As opposed to disgorgement, which requires a defendant’s payment to offset unjust enrichment on the part of the offender, criminal restitution has transformed into a type of punishment imposed as a result of committing a moral wrong—sometimes only loosely tied to the performance of a criminal act.<sup>170</sup>

The facts for setting the amount of criminal restitution are largely determined by the probation officer. Typically, the pre-sentence report is the sole “evidentiary” source for the restitution order. In the federal system, and in most states, a judge “may accept any undisputed portion of the presentence report as a finding of fact.”<sup>171</sup> In his dissent in *United States v. Booker*, a 2005 Supreme Court case, Justice Antonin Scalia noted that trial courts often must adopt “bureaucratically prepared, hearsay-riddled pre-sentence reports.”<sup>172</sup>

After reviewing the probation officer’s report, the trial court may impose restitution based on the report alone, request additional documentation, or conduct a separate restitution hearing, although the latter two options are rarely invoked.<sup>173</sup> In other words, the court may find facts and impose additional punishment without the imprimatur of the jury.

Along with determining the amount of restitution, the court must also create a payment schedule for the defendant.<sup>174</sup> Creating the payment schedule, however, does not require any input from the parties.<sup>175</sup> This means that it is

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<sup>166</sup> See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97–98 (2014).

<sup>167</sup> See *id.* at 95–96.

<sup>168</sup> *Id.* at 96.

<sup>169</sup> See *id.* at 96–97.

<sup>170</sup> See *id.* at 97.

<sup>171</sup> See FED. R. CRIM. P. 32(i)(3).

<sup>172</sup> *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting).

<sup>173</sup> See 18 U.S.C. § 3664(d)(4) (2012).

<sup>174</sup> See *id.* § 3664(f)(2).

<sup>175</sup> See *id.*



possible for the court to impose an impossible or extremely punitive payment schedule on the defendant, thereby increasing her punishment, without any outside input.

Finally, as with other suspended sentences, a court may revoke probation or supervised release upon finding that a defendant has defaulted on restitution.<sup>176</sup> In other words, the court can send a defendant to prison (or back to prison) for debt.

The cavalier way that courts treat the imposition of criminal restitution simply intensifies the problem. Courts routinely order criminal restitution for various types of offender conduct not proven by the government, “including acquitted conduct, conduct occurring outside the statute of limitations, and conduct involving victims not named in the indictment.”<sup>177</sup> Criminal restitution is imposed where there is no financial loss to the victim and where the loss is not specifically attributable to the defendant.<sup>178</sup> Like so many other types of financial punishment, criminal restitution lengthens the time an offender must remain in the purview of the criminal justice system and fails to consider the financial abilities of the defendant.

Many courts have simply assumed that restitution does not constitute criminal punishment and instead is compensation to the victim. In 1986, in *Kelly v. Robinson*, however, the Supreme Court held that restitution constitutes a criminal penalty and not compensation.<sup>179</sup> Thus, following Supreme Court precedent, when fact-finding is required, the imposition of restitution should always be determined by either by a jury or by some facet of the community.<sup>180</sup>

### *e. Probation, Parole & Post-Release Supervision Penalties*

Criminal justice debt continues through the end of an offender’s sentence and beyond, including any probation or post-release supervision. Probation and parole are another lucrative area for states and county criminal justice systems. In forty-four states and counting, offenders are billed for probation and parole supervision.<sup>181</sup>

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<sup>176</sup> See, e.g., *id.* §§ 3613A, 3614(a) (describing the power of federal courts upon criminal defendants based on default payments of restitution, which can also be applied to many state courts).

<sup>177</sup> See Lollar, *supra* note 166, at 98.

<sup>178</sup> See *id.*

<sup>179</sup> See *Kelly v. Robinson*, 479 U.S. 36, 53 (1986). This was in the context of deciding whether restitution under Connecticut statutes was subject to discharge in bankruptcy. See *id.* at 52–53.

<sup>180</sup> See generally *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that sentencing defendant above the statutory maximum, pursuant to the judge’s determination of deliberate cruelty, violated the defendant’s Sixth Amendment jury trial right).

<sup>181</sup> See Shapiro, *supra* note 48.

The rise of supervision fees over the last forty years,<sup>182</sup> for both parole and probation, has had an undeniably negative effect on offenders. Supervision fee policies focus almost entirely on raising money, giving local officials an immense amount of discretion on how to impose and collect said fees.<sup>183</sup>

A few themes emerge across the different districts and counties. In 1990, the National Institute of Justice (“NIJ”) published an influential study on how to best impose supervisory fees.<sup>184</sup> These included: “maximiz[ing] correctional agencies’ incentives to collect” since making the corrections institution directly benefit from fees increases revenue collection rates; “emphasiz[ing] supervision and room and board fees” because they could be applied to a wide swath of offenders; “levy[ing] fees on large numbers of offenders” while simultaneously making fee waivers extremely difficult to obtain; “avoid[ing] low supervision fees” because it costs the same amount to collect any fee; and generally developing prompt and increasingly severe consequences for collecting criminal debt.<sup>185</sup> Such draconian fee-setting and collection methods were based on an assumption that most offenders on probation could afford basic monthly supervision fees.<sup>186</sup> The NIJ’s underlying principles,<sup>187</sup> adopted by many states, illustrate how easily various supervision fees can be imposed on an offender and how difficult they are to discharge.

Similarly, courts in many states charge offenders specific fees to help defray the costs of overseeing probation services, entitled “offender-funded” probation.<sup>188</sup> Those offenders who undergo private probation—through no choice of their own as this is a county or state-wide decision—can be threatened with jail for failing to pay probation fees, and some are imprisoned for their inability to pay.<sup>189</sup> The longer it takes for offenders to pay off their criminal debts, the longer they stay on probation. The longer they stay on probation, the more they pay in supervision fees and the greater the threat of imprisonment if they default on their payments.<sup>190</sup> It is a Catch-22 that primarily benefits private, for-profit probation companies.

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<sup>182</sup> See Paul Peterson, *Supervision Fees: State Policies and Practice*, FED. PROB., June 2012, at 40, 40 (2012).

<sup>183</sup> See *id.*

<sup>184</sup> See generally DALE PARENT, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES (1990) (describing and recommending correctional fee collection practices for offenders at various points in the criminal justice system).

<sup>185</sup> See *id.* at 23–24.

<sup>186</sup> See Peterson, *supra* note 182, at 42.

<sup>187</sup> See *id.* at 41.

<sup>188</sup> See HUMAN RIGHTS WATCH, *supra* note 162, at 2.

<sup>189</sup> See *id.*

<sup>190</sup> See *id.* at 3.

A similar practice is known as “pay-only probation.”<sup>191</sup> Here, when an offender cannot immediately pay her fine, the court places her on a probation term, supervised by a private company.<sup>192</sup> If the offender cannot pay the weekly probation fees, then the private probation company directs the court to revoke an offender’s liberty and return her to incarceration.<sup>193</sup>

Large numbers of arrest warrants are issued every year for offenders who have failed to fully pay their private probation fees, either to return the offenders to the court for a probation revocation hearing or to coerce a probationer or her family into paying more of the debt.<sup>194</sup> Although it is technically the court’s job to sign the arrest warrants, often a private probation company employee prepares the warrant and simply hands it to the judge for signature—without review.<sup>195</sup>

Like so many other areas of fee-based criminal justice, often the offender ends up paying more in fees than the original fine amount, thus imposing extra punishment.<sup>196</sup> The offender-funded probation model shifts the entire burden of paying for probation onto the offenders themselves, who are overwhelmingly poor—if not entirely destitute.<sup>197</sup>

Moreover, many courts require offenders sentenced to probation to pay for the full costs of GPS monitoring, drug testing, and alcohol monitoring among other process requirements.<sup>198</sup> Such devices can cost \$180 to \$360 per month along with an initial start-up fee in the range of \$50 to \$80.<sup>199</sup> In the long term, these devices can be extremely pricey, making it even more difficult for low-income probationers to make the payments and stay out of jail.<sup>200</sup> For example, Augusta, Georgia uses an ankle bracelet breathalyzer called Secure Continuous Remote Alcohol Monitor (“SCRAMX”).<sup>201</sup> SCRAMX, which measures a person’s sweat for evidence of drinking alcohol, comes with a hefty price tag for a would-be user.<sup>202</sup> The breathalyzer requires a \$50 setup fee, a

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<sup>191</sup> *Id.*

<sup>192</sup> *See id.*; Jessica Pishko, *Locked up for Being Poor*, THE ATLANTIC (Feb. 25, 2015), <http://www.theatlantic.com/national/archive/2015/02/locked-up-for-being-poor/386069/> [<https://perma.cc/7VJ9-63H6>].

<sup>193</sup> *See* HUMAN RIGHTS WATCH, *supra* note 162, at 3; Pishko, *supra* note 192.

<sup>194</sup> *See* HUMAN RIGHTS WATCH, *supra* note 162, at 51.

<sup>195</sup> *See id.* at 57–58.

<sup>196</sup> *See id.* at 3.

<sup>197</sup> *See id.* at 22.

<sup>198</sup> *See id.* at 33.

<sup>199</sup> *See id.*

<sup>200</sup> *See id.*

<sup>201</sup> *See* Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014), <http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor> [<https://perma.cc/L2DV-F8VW>].

<sup>202</sup> *See id.*

\$39 per month supervision fee (which goes to the private probation company), and the costs of setting up a landline in an offender's home so the system can work—totaling over \$400 per month.<sup>203</sup> In addition, when part of an offender's probation requires participation in drug or alcohol treatment, she may be held responsible for the costs.<sup>204</sup>

Private probation profits are entirely derived from the fees paid by offenders.<sup>205</sup> Thus, the more monies created by exorbitant fees, fines, and surcharges, the better the bottom line for the company itself. This is a classic conflict of interest.<sup>206</sup> In addition, the probation company's de facto power to impose imprisonment upon debt-ridden offenders violates the Sixth Amendment right for the jury to determine punishment. Nowhere in the Bill of Rights does it mention the role of a for-profit probation company as arbiter of criminal punishment.

Even when probation is not outsourced to a private company, major fines and fees can still accrue to an offender. When imposed on the poor, a small offense can easily mushroom into a cavalcade of fines, jail stays, and fiscal penalties.

For example, one Maryland woman's initial conviction for drunk driving ultimately resulted in the imposition of \$25,000 bail, a month in jail, the loss of two jobs, a six-month suspension of her driving license, and the loss of thousands of dollars of "fees, legal costs and wages."<sup>207</sup> Donyelle Hall was initially arrested on suspicion of drunk driving.<sup>208</sup> After bail payment and release, Hall pled guilty and was placed on probation with the possibility to avoid conviction.<sup>209</sup> At her guilty plea, the judge sentenced Hall to eighteen months supervised probation, which would cost her \$105 a month for probation and drunken-driving monitoring, along with twenty-six weeks of alcohol education at \$70 per week, and thrice-weekly Alcoholics Anonymous ("AA") meetings.<sup>210</sup> In all, Hall initially owed \$385 per month in fees, along with court costs totaling \$252.50, the \$2,000 bail bond, and a license suspension of fourteen days.<sup>211</sup>

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<sup>203</sup> *See id.*

<sup>204</sup> *See* Colgan, *supra* note 23, at 288.

<sup>205</sup> *See* HUMAN RIGHTS WATCH, *supra* note 162, at 5.

<sup>206</sup> *See id.*

<sup>207</sup> *See* Shaila Dewan, *Probation May Sound Light, but Punishments Can Land Hard*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/probation-sounding-light-can-land-hard.html> [<https://perma.cc/G9FB-WGYM>].

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

Due to the byzantine rules of her probation agreement, however, Hall soon ran into trouble.<sup>212</sup> Her failure to let the court know and approve of a pending move resulted in a probation violation hearing, which took months to dismiss even though Hall had never ended up moving.<sup>213</sup> Hall's failure to fully document her attendance at the thrice-weekly AA meetings resulted in an arrest warrant for violating probation.<sup>214</sup> Her bond was set at five thousand dollars cash, meaning no bondsman could be used.<sup>215</sup> Unable to raise the full bond amount, Hall was sentenced to a term of imprisonment in the Baltimore City Detention Center, a notoriously dangerous and unhealthy jail, and stayed there thirty-four days.<sup>216</sup> Finally, because Hall violated her probation, the drunk-driving conviction, formerly suspended, was imposed, resulting in a six-month suspension of her license.<sup>217</sup> Thus, even with the best of intentions, a minor infraction resulting in probation can end up causing devastating consequences for an impoverished offender.

Similar problems dog paroled offenders. Often parole eligibility rests on an offender's capability to pay processing fees. If an offender cannot pay the fee, she must remain incarcerated and will not be paroled.<sup>218</sup> For example, in Pennsylvania, if an offender cannot pay the initial sixty dollar parole fee, she simply is not eligible for parole.<sup>219</sup>

In these ways, the interminable roster of court fees and fines have created a regime where incarceration does not result from the initial crime but as punishment for failure to pay the many fines, fees, and costs now associated with the criminal justice system.<sup>220</sup>

#### *f. Community Service & Expungement Charges*

Even community service has not escaped the inexorable pressure to extract cash from offenders. In Washington state, for example, there is a fee charged to the offender to serve on the county work crew—\$5 per day—even if that community service is an alternative to paying a fee.<sup>221</sup> Likewise, in Multnomah County, Oregon, there is a \$35 fee to participate in community service if the offender was sentenced to more than forty hours, although this

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<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See Colgan, supra note 23, at 287.*

<sup>219</sup> *See BANNON ET AL., supra note 14, at 6.*

<sup>220</sup> *See Shapiro, supra note 48.*

<sup>221</sup> *See id.*

can be waived for food stamp recipients with proper documentation.<sup>222</sup> California imposes a community service fee,<sup>223</sup> and Florida not only requires a small intake fee to begin community service but also assesses a \$50 fee from the offender if the community service is violated and she is returned to custody.<sup>224</sup> North Carolina is the most draconian of all, requiring a \$200 startup fee to begin a sentence of community service—even when the sentence is court-ordered as part of the punishment.<sup>225</sup>

The demand for payment can continue even after the offender has completed her sentence. For example, many states extend supervision periods as a direct result of failure or inability to pay.<sup>226</sup> This kind of action unquestionably increases an offender's punishment, especially since these supervision periods, if violated, can result in extra imprisonment.

In the event that an offender is permitted to expunge her record, it also arrives with a price. Many states charge an "expungement fee" to facilitate the eradication of the offenses.<sup>227</sup> In Oregon, for example, the court charges a \$252 expungement fee to apply to set aside an arrest record or conviction, payable to the state.<sup>228</sup> This fee is not refunded if the expungement fails.<sup>229</sup> It seems there is no aspect of criminal justice too small or too large to forgo cash register justice.

Far too often, the result of these accretive fees, fines, and costs is additional denial of the offender's liberty, whether from revocation of probation, imposition of suspended sentences, inability to afford parole costs (including required residential or out-patient treatment), or imposition of extra incarceration time due to offender's failure to pay.<sup>230</sup> In addition, the collateral consequences of these debts can be extremely harsh: those offenders on probation

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<sup>222</sup> See *Adult Community Service Fees*, MULTNOMAH COUNTY, <https://multco.us/dcj-adult/adult-supervision-fees/adult-community-service-fees> [<https://perma.cc/EV22-2V4X>] (last visited Sept. 5, 2016).

<sup>223</sup> See, e.g., *Frequently Asked Questions: Fines*, SUPERIOR CT. OF CAL., COUNTY OF SACRAMENTO, <https://www.saccourt.ca.gov/traffic/faq.aspx#fines> [<https://perma.cc/8UXN-KKTJ>] (last visited Sept. 5, 2016) (requiring court fees for defendants to whom community service is granted in Sacramento County).

<sup>224</sup> See, e.g., *Client Fees*, ORANGE COUNTY GOV'T, FLA. <http://www.orangecountyfl.net/Portals/0/Library/Jail-Judicial/docs/Client%20Fees%20FAQ.pdf> [<https://perma.cc/EJ7C-HHLQ>] (last visited Sept. 5, 2016) (requiring a fee for a defendant's violation of community service in Orange County).

<sup>225</sup> See BANNON ET AL., *supra* note 14, at 15.

<sup>226</sup> See Wright & Logan, *supra* note 29, at 1193.

<sup>227</sup> See *id.* at 1196.

<sup>228</sup> See *Set Aside Arrest Record or Conviction*, JEFFERSON & CROOK COUNTY CIR. CTS., OR. JUD. DIVISION <http://courts.oregon.gov/Crook/Pages/Expungement.aspx> [<https://perma.cc/JEY4-FXT4>] (last visited Sept. 5, 2016).

<sup>229</sup> See *id.*

<sup>230</sup> See Colgan, *supra* note 23, at 291.

and parole who fail to make payments can be cut off from obtaining Social Security, Electronic Benefit Transfer, Temporary Assistance for Needy Families, Section 8 housing, and the like.<sup>231</sup> Sometimes felons must pay all outstanding debts before their voting rights are restored.<sup>232</sup>

Finally, these financial sanctions and their repayment systems place an added burden onto a class of people—the poor and indigent—who already shoulder an increased load from the stress of poverty. Because scarcity places extra cognitive demands that complicate rational decision-making, dealing with the additional burden of monetary sanctions can adversely affect all of an offender’s decision-making.<sup>233</sup>

In sum, the continual accretion of criminal justice debt can be ruinous, particularly to those living on the margins. The penalties assessed against defendants have continued to balloon, “becoming an engine of economic disadvantage in their own right and leading some to bemoan the resurrection of debtor’s prison.”<sup>234</sup> The increasing levels of fines, assessments, interest, and other miscellaneous fees assessed in criminal adjudication, in both felony and misdemeanor convictions, is astounding.<sup>235</sup> The total amounts assessed per conviction, often hard to calculate because they are levied in so many different ways and by so many different actors, are simply out of reach for many offenders.

As a result, state and county jails have been transformed from holding pens to booming revenue centers. Over the past thirty years, the number of annual jail admissions has grown from six million in 1983 to 11.7 million in 2013.<sup>236</sup> Once incarcerated, jailed offenders spend more time in prison than ever before; the average length of stay has grown from fourteen days in 1983 to twenty-three days in 2013.<sup>237</sup> Many of these admissions are comprised of not-yet-convicted offenders, held primarily because they are too poor to pay the price of release.<sup>238</sup>

These periods of imprisonment, brief or not, can have long-lasting and sometimes devastating consequences on offenders, including increasing the

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<sup>231</sup> See *id.* at 293.

<sup>232</sup> See Shapiro, *supra* note 48.

<sup>233</sup> See R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1781 (2015).

<sup>234</sup> See Natapoff, *supra* note 26, at 114. Natapoff discusses misdemeanor defendants in particular, but her observation is equally applicable to all criminal offenders, especially the indigent. See *id.*

<sup>235</sup> See Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. ACCESS TO JUST. 223, 227 (2007).

<sup>236</sup> See RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INST.OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 7 (2015).

<sup>237</sup> See *id.* at 10.

<sup>238</sup> See *id.* at 2.

likelihood of receiving a harsher sentence, reducing an offender's economic viability, promoting their future criminal behavior, and worsening their health.<sup>239</sup> Therefore, any financial sanction imposed on offenders ultimately resulting in incarceration can create a cavalcade of long-lasting punishment, punishment that can stretch on for years.

#### 4. Additional Financial Impositions

##### *a. Penalties, Interest and Collection*

When criminal justice debt is not paid off on time, there are often multiple harsh penalties and interest imposed. Penalties for non-payment can be either flat-rate or percentages of the original fee(s) and sometimes involve private collection agencies, which, of course, add their own separate charges.<sup>240</sup> Interest rates, which are frequently stacked on top of monetary penalties, surpass ten percent in some jurisdictions.<sup>241</sup> For example, in Washington State, felony cases accrue a twelve percent interest on any costs from the moment of judgment until all fines, fees, costs, restitution, and interests are repaid.<sup>242</sup> The average amount of debt in Washington state felony cases is approximately \$2500—an impossible amount of money for an impoverished offender to remit.<sup>243</sup>

States also impose collection fees when attempting to recoup criminal justice debt.<sup>244</sup> In Florida, for example, private collection agencies can charge individuals up to a forty percent surcharge on amounts collected, and Illinois law authorizes charging individuals who fall behind on payments with a fee of thirty percent of the delinquent amount.<sup>245</sup> Most states do not evaluate an offender's ability to pay when imposing these extra sanctions.<sup>246</sup>

When extended payment plans are an option, they come with high minimum payments and additional penalties if payments are late.<sup>247</sup> In Ferguson, Missouri, for example, the standard court payment plan required payments of one hundred dollars per month, which remains a difficult amount for many criminal offenders to routinely produce.<sup>248</sup> Further complicating issues, the

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<sup>239</sup> *See id.* at 5.

<sup>240</sup> *See* Wright & Logan, *supra* note 29, at 1192.

<sup>241</sup> *See* Colgan, *supra* note 23, at 288.

<sup>242</sup> *See* Shapiro, *supra* note 48.

<sup>243</sup> *See id.*

<sup>244</sup> *See* Colgan, *supra* note 23, at 288.

<sup>245</sup> *See* BANNON ET AL., *supra* note 14, at 17.

<sup>246</sup> *See id.*

<sup>247</sup> *See* Wright & Logan, *supra* note 29, at 1192.

<sup>248</sup> *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 53 (2015).



Ferguson court treated a “single missed, partial, or untimely payment as a missed appearance,” which immediately generated an arrest warrant.<sup>249</sup> In fact, Ferguson frequently used its police department as a “collection agency” for its court.<sup>250</sup> Such a harsh approach to unpaid financial penalties—practiced in a variety of cities and counties—thus not only increases an offender’s debt but also potentially lands her back into custody.

Adding to the burden, state statutes frequently forbid courts from taking an offender’s indigent status into consideration when punitive fees, interest, and collection costs are imposed.<sup>251</sup> Even when states or counties are permitted to consider financial ability, they often do not.<sup>252</sup>

The long tail of these mercenary punishments can stretch on and on for impoverished offenders.<sup>253</sup> In addition to the often-crushing economic load, such financial burdens can negatively affect an offender’s employment by keeping criminal histories open until the debt is paid. These “penalties transform punishment from a temporally limited experience to a long-term status.”<sup>254</sup>

These systems of fines layered upon fines, often resulting in incarceration when enough money is owed or accounts prove delinquent, violates the Sixth Amendment jury trial right. The current schema of cash register justice means that often unauthorized punishment is doubly imposed through both punitive monetary sanctions and the potential of actual imprisonment. Both levy punishment without the imprimatur of a jury or the community.

### *b. Child Support Debt*

Imprisonment spurs its own cavalcade of criminal debt troubles, including paying child support. In many states, debt from child support orders can accrue at an alarming rate since an offender’s felon status often prevents her from obtaining a reduced income modification from the court while imprisoned.<sup>255</sup> An offender’s inability to earn wages to pay child support is often disingenuously called “voluntary unemployment,” attributing an imprisoned offender’s re-

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<sup>249</sup> *See id.*

<sup>250</sup> *See id.* at 55.

<sup>251</sup> *See Colgan, supra* note 23, at 289.

<sup>252</sup> *See, e.g.,* MO. REV. STAT. § 560.026 (2013) (“In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual.”). This directive has been virtually ignored by Ferguson courts. *See* U.S. DEP’T OF JUSTICE, *supra* note 248, at 53.

<sup>253</sup> *See* Shapiro, *supra* note 48.

<sup>254</sup> *See Colgan, supra* note 23, at 295 (quoting Harris et al., *supra* note 27, at 1755) (internal quotation marks omitted).

<sup>255</sup> *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, JUDGES’ J., Winter 2004, at 5, 6.

duced income as self-created through their criminal acts.<sup>256</sup> This makes the child support orders ineligible for modification.<sup>257</sup> In other words, classification of incarceration as voluntary unemployment turns the requirement of child support into a “proxy for further punishment.”<sup>258</sup>

In addition, even in states that allow such imprisonment modifications, offenders still need to immediately petition the family court to temporarily reduce their monthly child support payment orders or the child support debt becomes unreviewable under the Bradley Amendment.<sup>259</sup> Child support review and adjustment is often slow and cumbersome, and responses to inmate requests can be extremely variable.<sup>260</sup> As a result, on average, offenders leave incarceration with more than twenty thousand dollars in child support arrears.<sup>261</sup>

Adding to this, due to congressional legislation, parents that miss child support payments face a host of new, aggressive enforcement actions.<sup>262</sup> In some states, payment of child support is a parole requirement, with nonpayment potentially leading to the offender’s re-incarceration for parole violation.<sup>263</sup> Thus, child support debt is simply another part of the complex labyrinth of criminal justice debt.

Even if these types of fees and fines are small, they often present an insurmountable hurdle to impoverished defendants. Local courts can be merciless in requiring immediate payment of criminal justice debt, threatening jail for non-payment. Some courts have gone even further in their demands. In Marion, Alabama, for example, a circuit court judge told the defendants in his courtroom that if they could not pay the fines owed, they could either donate blood (and receive a hundred-dollar credit towards their fine) or go to jail.<sup>264</sup> This literal attempt to wring blood from a stone (or impoverished offender, to be precise) is but an extreme example of courts and local governments trying to generate revenue by imposing fines, fees, court costs, and interest.<sup>265</sup>

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<sup>256</sup> See Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 385 (2012).

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> 42 U.S.C. § 666(a)(9) (2012); see also Cammett, *supra* note 256, at 385–86, 85 n.211. The Bradley Amendment is a 1986 amendment to the Social Security Act that prohibits courts from vacating child support orders after they have been issued. Cammett, *supra* note 256, at 85 n.211.

<sup>260</sup> See Pearson, *supra* note 255, at 7.

<sup>261</sup> See Cammett, *supra* note 256, at 386.

<sup>262</sup> See Pearson, *supra* note 255, at 8.

<sup>263</sup> See *id.*

<sup>264</sup> See Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), <http://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html> [https://perma.cc/97AR-CYYH].

<sup>265</sup> See *id.*

The cycle of excess punishment created by the endless imposition of financial sanctions, interest, collections, and additional incarceration is largely accretive and without a central driver. This imposition of criminal justice debt comes from all sources and sides, excluding only one: the community, the only actor that is constitutionally permitted to arbitrate or increase an offender's punishment.

## II. APPLYING THE SIXTH AMENDMENT TO CRIMINAL JUSTICE DEBT

When criminally imposed fines and imprisonment morph from regulatory to punitive, as in the case of criminal justice debt, the Sixth Amendment jury trial right dictates that the community must have a say in the punishment imposed. In the line of cases arising from *Apprendi v. New Jersey* in 2000 and *Blakely v. Washington* in 2004 (hereinafter "*Apprendi-Blakely*"), the Supreme Court reinvigorated the Sixth Amendment right to a jury, concentrating on the need for the local community, in the form of the jury, to impose punishment on those found guilty.<sup>266</sup> By focusing on this basic idea—that a valid conviction requires all aspects of a crime be determined by a jury—the Court "provided the basis for [its] decisions interpreting modern criminal statutes and sentencing procedures."<sup>267</sup> The ever-increasing list of criminal justice debts imposed by courts, legislatures, and private firms is even more dubious when contrasted against the Supreme Court's recent spate of opinions repeatedly highlighting the community's right to determine all punishment imposed on an offender.

### *A. Looking at Criminal Punishment Through the Lens of the Sixth Amendment*

Over the past sixteen years, the Supreme Court has heavily relied on the historical role of the community as an arbiter of punishment, contending that only a jury can find facts that increase a convicted offender's penalty. Specifically, in the *Apprendi-Blakely* line of cases, the Supreme Court reinvigorated the Sixth Amendment jury right, concentrating on the need for the community, as jury, to impose punishment on convicted offenders.

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<sup>266</sup> See Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 570 (2015) (describing the expansion of the Sixth Amendment jury trial for criminal defendants after *Apprendi*). See generally *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that defendant's sentencing, which was above the statutory maximum because of the judge's determination of deliberate cruelty, violated defendant's Sixth Amendment jury trial right); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the sentencing beyond a statutory maximum must be reviewed by the jury and proven beyond a reasonable doubt).

<sup>267</sup> *United States v. Booker*, 543 U.S. 220, 230 (2005).

In *Blakely*, the Supreme Court fully articulated the community's historical right to a jury trial.<sup>268</sup> At its narrowest, *Blakely* specifically held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>269</sup> By holding that a court can only sentence a defendant on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself, the *Blakely* Court eliminated all judge-made enhancement of sentences beyond their maximum.<sup>270</sup>

*Blakely*'s holding, however, has proved far more expansive than simply determining which body may find facts that increase an offender's maximum sentence. In responding to the slow diminution of the jury right's traditional and proper scope, the *Blakely* Court firmly reestablished the paramount territory of the jury in criminal decision-making and punishment. This broad *Blakely* mandate stems from the importance the Court has invested in the role of the jury, based on its historic and constitutional role in our criminal justice system.

By holding that a court can sentence a defendant only on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself,<sup>271</sup> the *Blakely* Court gave strong support to the idea that the community must have the final word on criminal punishment. Thus, the importance of the community determining criminal punishment is critical to the Court's current understanding of the rights of the jury.

Since deciding *Blakely* in 2004, the Court has not only reaffirmed the jury's right to decide all punishment but has continually applied its rule to new areas. For example, in 2002, in *Ring v. Arizona*, the Supreme Court applied this jury right to capital punishment;<sup>272</sup> in 2012, in *Southern Union Co. v. United States*, to criminal fines;<sup>273</sup> and in 2013, in *Alleyne v. United States*, to mandatory minimums.<sup>274</sup> Most recently, in 2016, the Court in *Hurst v. Florida* once again reaffirmed the importance of the jury's right to decide every aspect of punishment, reminding states that the Sixth Amendment requires “a jury, not a judge, to find each fact necessary to impose a sentence of death.”<sup>275</sup>

<sup>268</sup> *Blakely*, 542 U.S. at 301.

<sup>269</sup> *Id.* (quoting *Apprendi*, 530 U.S. at 490).

<sup>270</sup> Critically, the majority found that “[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.” *Id.* at 304 (citation omitted).

<sup>271</sup> See *Booker*, 543 U.S. at 231–32 (“If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.” (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002))).

<sup>272</sup> See *Ring*, 536 U.S. at 607.

<sup>273</sup> See *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350–51, 2357 (2012).

<sup>274</sup> See *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

<sup>275</sup> See *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

More relevant to the analysis here, however, is the Court's recent extension of the *Apprendi-Blakely* reasoning to criminal fines. *Southern Union* held that the Sixth Amendment applies to the imposition of criminal fines as well as to other criminal penalties.<sup>276</sup> This represents a dramatic change from what many courts have assumed over the years particularly that most impositions of a criminal fine are punitive.

The *Southern Union* Court held unequivocally for the first time that *Apprendi* applies to the imposition of criminal fines.<sup>277</sup> The Court explained that it does not—and has never—distinguished one form of penal sanction from another, and thus *Apprendi* must apply to all criminal sanctions: “*Apprendi*’s ‘core concern,’ is to reserve to the jury ‘the determination of facts that warrant punishment for a specific statutory offense’ . . . [and] [t]hat concern applies whether the sentence is a criminal fine or imprisonment or death.”<sup>278</sup>

Ultimately, the Court in *Southern Union* determined that there is no principled basis for treating fines any differently from other penalties. This is because the Court has “broadly prohibit[ed] judicial factfinding that increases maximum criminal ‘sentence[s],’ ‘penalties,’ or ‘punishment[s]’—terms that each undeniably embrace fines.”<sup>279</sup> Nomenclature aside, any decision made to increase punishment on an offender can only be made by the jury.

In *Southern Union*, then, the Court re-affirmed the broadness of *Apprendi-Blakely*, holding that any punishment rendered by the courts, including criminal fines, should have its facts determined by a jury beyond a reasonable doubt.<sup>280</sup> This was because the Court found that criminal fines, although different in type from imprisonment, were *not so different in substance*. In other words, there was no “principled basis” to treat the two differently.<sup>281</sup>

The *Southern Union* Court highlighted that a central concern in criminal justice is the jury’s determination of facts that impose punishment for criminal offenses. This must include criminal fines because, as the Court reasoned, fines are just another form of penalty inflicted by the government for the commission of offenses. Thus in *Southern Union*, the Court once again signaled that when it comes to imposing punishment on offenders—no matter what kind of penalty—it is only the province of the jury to judge. Ultimately, *Southern Union* helps bolster what we have already learned: that the community must adjudicate punishment in all types of criminal procedures, from the front-end to the back-end, in whatever form they arise.

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<sup>276</sup> See *S. Union*, 132 S. Ct. at 2350–51.

<sup>277</sup> *Id.* at 2357.

<sup>278</sup> *Id.* at 2350 (citation omitted).

<sup>279</sup> *Id.* at 2351.

<sup>280</sup> See *id.* at 2350.

<sup>281</sup> *Id.*

Likewise, any restitution imposed may violate the historical Sixth Amendment jury trial right unless the jury is the one to determine the penalty's amount. The history of criminal restitution in this country gives weight to this claim. Up until the nineteenth century, courts usually imposed restitution only when it was based on the facts alleged in the indictment, following a defendant's conviction.<sup>282</sup> This meant that a jury had to specifically find, beyond a reasonable doubt, that goods had been lost and a defendant should be punished for this loss by providing restitution to the victim. This is similar to the requirement that juries must find all facts that impose punishment. Thus, looking at the historical parallels alone, it makes sense that the jury trial right applies to criminal restitution.

Of course, imposing restitution on behalf of sympathetic victims is difficult to oppose. Nonetheless, courts and counties should not simply ignore the Sixth Amendment jury trial right, which quite plainly precludes non-jury fact-finding whenever this increases the defendant's punishment. Any and all of the restitution procedures that impose punishment upon a defendant without jury input, whether local, state, or federal, plainly usurp the community's rightful role and violate our current understanding of both *Apprendi-Blakely* and the community jury trial right.

Despite the Court's recent decisions requiring the imprimatur of the community in determining criminal punishment, fines, and restitution, however, the imposition of criminal justice debt still takes place in the neglected corners of criminal justice. The Court's refusal to cabin the ramifications of *Blakely* leaves an opening to integrate the community jury right into the realm of criminal justice debt.

The Court has focused on the jury as a representative of the community and the only appropriate body to impose punishment on a convicted offender. It is equally important that the community have a say in determining whether punishment is imposed through fees, fines, and sanctions. The *Apprendi-Blakely* line of decisions forbidding imposition of punishment until the jury has decided guilt or innocence must inform our practices governing criminal justice debt, particularly when the endless array of financial sanctions frequently results in additional imprisonment for the offender.

Our failure to regulate this wild west of criminal fees and fines—imposed by a startling variety of different actors—results in the imposition of unjustified punishment, whether financial or incarcerative. Until very recently, these mercenary punishments took place virtually unnoticed and un-remedied. As

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<sup>282</sup> See James Barta, Note, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 AM. CRIM. L. REV. 463, 477 (2014).

such, the spirit of the Supreme Court's recent Sixth Amendment jurisprudence should also apply to all sorts of criminal justice debt in a variety of circumstances. Whenever criminally imposed fines and detention turns from regulatory to punitive, the community must have a say in the punishment imposed.

### *B. When Civil Sanctions Transform into Criminal Punishment*

Delineating civil sanctions from criminal punishment can be more challenging than it first appears. The Supreme Court has promulgated a lengthy, multi-part test to determine whether a sanction is criminal or civil. In 1963, in *Kennedy v. Martinez-Mendoza*, the Supreme Court provided seven benchmarks to determine whether a sanction has a punitive purpose or effect.<sup>283</sup> These guideposts are: (1) does the "sanction involve[] an affirmative disability or restraint;" (2) has the sanction "historically been regarded as a punishment;" (3) does the sanction rely on a "finding of scienter;" (4) will the operation of the sanction "promote the traditional aims of punishment—retribution and deterrence;" (5) whether "the behavior to which [the sanction] applies is already a crime;" (6) can an "alternative purpose" be rationally connected to the sanction; and (7) whether the sanction "appears excessive in relation to the alternative purpose assigned."<sup>284</sup> Applied to the majority of criminal justice debt, the results seem to be that these sanctions are a restraint on most offenders' finances; historically, regarded as punishments (as most fines were); often not based on findings of scienter; do not neatly fit into the traditional aims of punishment, retribution and deterrence; can result as a consequence of already criminalized behavior; and impose excessive punishment relative to other potential sanctions.

More recently, the Supreme Court addressed the question of when monetary forfeitures become punishment in *United States v. Bajakajian*.<sup>285</sup> In 1998, the *Bajakajian* Court had to determine, under the Eighth Amendment's Excessive Fines Clause, whether forfeitures are fines that are punitive in nature.<sup>286</sup> In its determination, the Court first reminded the government that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'"<sup>287</sup>

The *Bajakajian* Court held that the forfeiture of currency ordered by the contested federal statute constituted punishment because it served no "remedial purposes," and made a careful distinction between traditional civil forfeitures

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<sup>283</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). Thanks to Mike Mannheimer for making this point.

<sup>284</sup> *See id.*

<sup>285</sup> *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

<sup>286</sup> *See id.*

<sup>287</sup> *See id.* at 328 (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)).

and those based on criminal matters.<sup>288</sup> This distinction is important because the Supreme Court classified forfeitures, fees, and fines stemming from the criminal justice system as punitive despite the government's attempted re-categorization.<sup>289</sup>

Accordingly, *Bajakajian*'s holding—that monetary forfeitures are fines under the Eighth Amendment if they constitute punishment for an offense<sup>290</sup>—helps clarify our understanding of fines under the Sixth Amendment. The Court strongly indicated that a criminal offender's disgorgement of funds is likely to be considered punitive, not remedial. When this interpretation is applied to the vast architecture of criminal justice debt, this means that a large swath of it can be adjudged punishment.

When reviewed as a whole, there is little doubt that, for the poor, imposing criminal justice debt results in punishment. Even some of the judges imposing these criminal justice debts have admitted that their nature is punitive—not civil—in nature. As District Court Judge Robert Ingvalson stated when asked about his practice of jailing offenders with unpaid court fees: "Fines are exactly how they sound—punishment . . . They're given a fine and if they can't or won't pay it, there are alternatives."<sup>291</sup> Offenders struggling to pay such economic sanctions—fearing high interest rates, forced labor on work crews,<sup>292</sup> or imprisonment due to their inability to pay back their criminal justice debt—would certainly agree.

### III. WHAT COUNTS AS PUNISHMENT?

In legal terms, it seems that the majority of criminal justice debt qualifies as punishment. What about philosophically? In other words, when does the standard, constitutional reduction in liberties, when arising from criminal justice fines and fees, climb to the level of punishment? When does the basic imposition of criminal justice debt transform into punishment as understood by punishment theorists? If criminal justice debt is assumed to legally be punishment, then it should be morally treated in the same way as other forms of punishment.

To answer this question, this Article looks to retributive theory as well as a subjective understanding of punishment. The question of when state-denied liberties qualify as punishment has been previously raised in the Eighth Amendment context, both under the Excessive Fines Clause and the Cruel and

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<sup>288</sup> *See id.* at 332.

<sup>289</sup> *See id.*

<sup>290</sup> *See id.* at 328.

<sup>291</sup> *See Richardson, supra* note 121.

<sup>292</sup> *See id.*



Unusual Punishment Clause, but never from the viewpoint of the Sixth Amendment's jury trial right requirement. This Article seeks to determine when the imposition of criminal justice debt rises to punitive levels, thereby triggering the Sixth Amendment community jury trial right.

When discussing whether criminal justice fees, fines, and penalties are punitive, it is helpful to start at the most basic understanding of what we commonly consider punishment. Of course, criminal philosophy has long attempted to define and justify "criminal punishment," a famously open-ended term.<sup>293</sup> The contours of criminal punishment as they relate to terms such as "offense gravity, harm, and offender culpability" are often nebulous and difficult to delineate.<sup>294</sup>

Most broadly, a state response to conduct does not always qualify as punishment. Following H.L.A. Hart, the state response must meet several requirements: (1) involving "pain or other consequences normally considered unpleasant;" (2) "for an offence against legal rules;" (3) "of an actual or supposed offender for his offence"; (4) "intentionally administered by human beings other than the offender;" and (5) "imposed and administered by an authority constituted by a legal system against which the offence is committed."<sup>295</sup> Outside this strict taxonomy, however, not all state-imposed sanctions qualify as punitive. Such things as taxes, license revocations, or benefit terminations are not imposed "for an offender for his offence." Thus, although they can be classified as deprivations, they do not rise to the level of punishment.<sup>296</sup>

So when do state-imposed sanctions rise to the level of punishment? Punishment can be defined as "the infliction of pain on a person because he has done wrong."<sup>297</sup> John Rawls explained that "a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of the citizen on the ground that he has violated a rule of law . . . ."<sup>298</sup> More comprehensively, Andrew von Hirsch argued that "[p]unishing someone consists of visiting a deprivation (hard treatment) on him, because he has committed a wrong, in a manner that expresses disapprobation on the person for his conduct."<sup>299</sup> All of these definitions would certainly include financial sanctions imposed by the state.

<sup>293</sup> See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 595–97 (2012).

<sup>294</sup> See Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 738–39 (2009).

<sup>295</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4–5 (1968)

<sup>296</sup> See DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 93 (2008).

<sup>297</sup> See J.M.E. MCTAGGART, STUDIES IN HEGELIAN COSMOLOGY 129 (1984).

<sup>298</sup> John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955).

<sup>299</sup> Andrew von Hirsch, *Censure and Proportionality*, in A READER ON PUNISHMENT 112, 118 (R.A. Duff & David Garland eds., 1994).

Von Hirsch's understanding of punishment proves the most useful here. The principal justification for punishment is censure: to import blame or condemnation to those who have committed wrongful acts.<sup>300</sup> This is because censure "is the authentic expression of the condemner's ethical judgment."<sup>301</sup> Von Hirsch concludes that punishment in Western societies involves public denunciation or censure of criminal conduct by the state.<sup>302</sup>

Importantly, von Hirsch includes "hard treatment"<sup>303</sup> in his understanding of punishment, which, as commonly defined, covers "fines, probation, community service, electronic monitoring, home detention curfews, compulsory involvement in treatment or education programs," and "imprisonment".<sup>304</sup> All of these forms of "hard treatment" impinge on an individual's liberty and personal autonomy to various extents.<sup>305</sup> Equally important, however, is the message of blame that such hard treatment is supposed to convey.<sup>306</sup> In von Hirsch's view, the messages of censure and crime control are closely intertwined, in that "hard treatment" both communicates censure and provides motivation to follow the law.<sup>307</sup>

Likewise, "condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former."<sup>308</sup> Thus, in accepting that many, if not most, of these financial penalties levied on offenders qualify as hard treatment, a certain level of condemnation—or punitive expression—attaching to their imposition, whether intentional or not, must also be accepted. The state cannot use its lack of punitive intent as an excuse to impose financial punishment when that punishment causes true suffering.

The suffering that harsh treatment creates should be given some recognition in the criminal law and sentencing context.<sup>309</sup> For example, in pretrial detention, credit against future punishment is granted for time served, even though pretrial detention is not commonly called "punishment."<sup>310</sup> Hence, the

<sup>300</sup> See ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 3 (1996).

<sup>301</sup> *Id.* at 25.

<sup>302</sup> *See id.* at 12–13.

<sup>303</sup> *See id.* at 12.

<sup>304</sup> See PAUL ROBERTS & ADRIAN ZUCKERMAN, *CRIMINAL EVIDENCE* 12 (2010).

<sup>305</sup> *See id.*

<sup>306</sup> *See* VON HIRSCH, *supra* note 300, at 13.

<sup>307</sup> *See id.* at 12–13.

<sup>308</sup> JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 118 (1970).

<sup>309</sup> See Adam J. Kolber, *Against Proportional Punishment*, 66 *VAND. L. REV.* 1141, 1156 (2013). Although here Kolber is specifically discussing whether pretrial detention should be considered punishment (answering in the negative), he also classifies pretrial detention as harsh treatment, which he defines as the creation of suffering or deprivation even when not intentionally done as a matter of punishment. *See id.* at 1155.

<sup>310</sup> *See id.*

mere fact that something is not *called* punishment (e.g., à la Hart, it was not imposed on an offender for an offense) does not mean it is not essentially *like* punishment.

This last insight is particularly applicable to the criminal justice debt discussed in Part I. Since these financial sanctions are themselves harsh treatment, allowing various public and private institutions to increase the penalties through additional harsh treatment, whether additional charges, interest, or actual imprisonment, seems excessively punitive.

Most expansively, punishment can be defined as inflicting something unwelcome on the recipient: “the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or, in extreme cases death.”<sup>311</sup> Criminal justice debt can be easily added to this definition, especially when it spirals into increased payments, interest charges, and additional incarceration for the offender.

All of the hard treatment created by criminal justice debt qualifies as punishment because it interferes with “important interests,”<sup>312</sup> ones that include the basic liberties taken for granted by free citizens. The effect of imprisonment on freedom of movement and privacy, for example, makes it a severe sanction. Similar reasoning should be applicable to the noncustodial sanctions that impose extreme hardship on indigent offenders. Ultimately, “[t]he censure in punishment is expressed through the imposition of a deprivation (‘hard treatment’) on the offender.”<sup>313</sup>

Put another way, the curtailment of any of these “taxonomy of interests”<sup>314</sup> counts as punishment because these “hard treatment” penalties have a definitive, negative effect on the quality of offenders’ lives. Recognizing the punitive effects of these fees and fines goes beyond a narrow focus on *physical* restrictions to a more expansive view of punishment, in or outside prison walls.

Antony Duff’s understanding of punishment also includes punitive measures other than incarceration. Duff contends that punishment’s aim is to communicate the condemnation of an offender’s conduct, seeking her self-denunciation and modification of her future conduct.<sup>315</sup> Certainly the vast web of fees, fines, costs, and penalties imposed upon offenders fit into this conception of punishment, as the extreme hardship imposed by such criminal justice debts is likely to encourage an offender to modify future actions.

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<sup>311</sup> NIGEL WALKER, *WHY PUNISH?* 1 (1991).

<sup>312</sup> See HUSAK, *supra* note 296, at 92.

<sup>313</sup> ANDREW VON HIRSH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 21 (2005).

<sup>314</sup> VON HIRSCH, *supra* note 300, at 35.

<sup>315</sup> See ANTONY DUFF, *TRIALS AND PUNISHMENT* 238 (1986).

Of course, the imposition of “hard treatment” necessitates both careful and measured scrutiny before criminal punishment is inflicted.<sup>316</sup> Any increase in an offender’s sentence—even through a breach by the offender through failure to pay fines or other minor violations—can be viewed as punishment.<sup>317</sup> With acts of breach, “if the offender is now going to be punished more severely than he seemed to deserve at his earlier sentencing, and more severely than authorized by his plea or conviction at the time, criminal-trial due process must be observed.”<sup>318</sup> If this due process is not followed, “enhancing [an offender’s] prior-crime sentence might violate *Blakely* requirements.”<sup>319</sup> This argument supports this Article’s primary contention: that criminal justice debt transforms far too easily into repeated imposition of punishment, violating the Sixth Amendment jury trial right.

Other scholars, however, have argued that fines should not be considered punishment. For example, some contend that alternative economic sanctions inadequately express the expressive dimension of punishment and thus do not resonate with the same level of punitive force as imprisonment.<sup>320</sup> Alternative sanctions, such as fines,<sup>321</sup> probation, and community service, fail to express condemnation as dramatically and unequivocally as imprisonment.<sup>322</sup> This is because nothing transmits condemnation quite as much as denial of an offender’s liberty.<sup>323</sup> In other words, when a society “merely fines” an offender for a bad act, “the message is likely to be different: you may do what you have done, but you must pay for the privilege.”<sup>324</sup>

Nonetheless, this argument about fines’ meager punitive effect only really applies to those offenders who can afford them. As discussed in Part I, the vast percentage of criminal offenders have difficulty paying even a small fee, fine, or sanction, often leading them into financial difficulties that can eventually result in ultimate punishment, imprisonment, or deprivation of liberty.

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<sup>316</sup> See ROBERTS & ZUCKERMAN, *supra* note 304, at 12.

<sup>317</sup> RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 105 (2013).

<sup>318</sup> *Id.* at 104–05.

<sup>319</sup> *Id.* at 105.

<sup>320</sup> See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996).

<sup>321</sup> It is important to distinguish here between fines imposed at sentencing and fines imposed otherwise. Criminal fines imposed at sentencing are specifically devised as punishment. The fines discussed above, however, are usually imposed in addition to whatever “official” punishment is imposed.

<sup>322</sup> See Kahan, *supra* note 320, at 592.

<sup>323</sup> See *id.* at 593.

<sup>324</sup> *Id.*

Alternative sanctions like criminal justice debt may not seem as harsh a punishment as incarceration.<sup>325</sup> Criminal justice debt, however, ends up being enormously punitive for the segment of society processed through the criminal justice system. Even critics of alternative sanctions point out the importance of paying close attention to the social meaning of criminal punishment.<sup>326</sup> Thus, although a small fine of, say, three hundred dollars might signify a minimal punishment—a slap on the wrist—to the average middle-class offender, this same fine would loom large for the poor or indigent offender, potentially imposing punishment well above any assumed level.

In addition, fees, fines, costs, and sanctions tend to be automatically imposed, which fails to account for the offender's baseline financial position. During the discussion of a defendant's severity of punishment, her baseline condition is usually ignored even though most standard punishments do not affect each offender's situation equally.<sup>327</sup> Indeed, "it is the amount by which we change offenders' circumstances that determines the severity of their sentences."<sup>328</sup> Accordingly, it is important to recognize the comparative nature of punishment to justify some of the harsh treatment we impose on offenders, particularly if we want to stay true to a framework of proportional punishment.<sup>329</sup>

The true severity of any punishment, of course, depends on the ways in which it negatively affects an offender's life.<sup>330</sup> Financial sanctions such as fees, fines, and restitution are obvious candidates for analysis under the comparative nature of punishment because such penalties have a much stronger impact on the poor and indigent, who make up a large percentage of the offenders cycled through the criminal justice system. The severity of the harm—and ultimately, the punishment—is much greater for this group of defendants than the more fiscally comfortable.

When imposing punishment, even financial punishment, both the penalty and the amount of burden that is imposed must be justified.<sup>331</sup> Blindly levying

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<sup>325</sup> Indeed, when compared to the threat of initial imprisonment, most offenders would choose fines over incarceration. Certainly imprisonment injures the poor even more severely than the average offender. The reality of criminal justice debt, however, is that an offender's failure to repay it often leads to incarceration anyway, leaving the offender no better off in the long run. Thanks to Curtis Bridgeman for pointing out this issue.

<sup>326</sup> See Kahan, *supra* note 323, at 59.

<sup>327</sup> See Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1566 (2009).

<sup>328</sup> *Id.*

<sup>329</sup> See *id.*

<sup>330</sup> See *id.* Kolber makes this argument in regards to imprisonment in particular, but his point is equally applicable—and perhaps even more powerful—to financial sanctions such as criminal justice debt.

<sup>331</sup> See *id.* at 1568.

similar monetary penalties on offenders who are equally blameworthy but not equally situated discards any commitment to true equality of punishment.<sup>332</sup> The harms that result from the burdens of financial penalties for many defendants can result in “harm-absent justification,”<sup>333</sup> meaning that there is little justification for the extra harms imposed. Some countries have recognized the variation of subjective experience created by criminal justice debts by providing for fine amounts that are percentages of income, including fines for traffic violations, securities fraud, and shoplifting.<sup>334</sup>

All of this points to the great need for the criminal justice system to take an offender’s financial circumstances into account when weighing the experience of criminal punishment. As has been argued in a slightly different context, the criminal justice system should not ignore the effects that punishment has on offenders’ lives when calculating the severity of a chosen punishment.<sup>335</sup> As these scholars correctly contend, “the state is responsible for the foreseeable, proximately caused effects of punishment—effects that the typical offender will understand to be part of her punishment—and this responsibility should influence the legislative crafting of punishments.”<sup>336</sup> Impoverished or indigent defendants understand far too well that the additional punishment imposed through the accretive fines, fees, surcharges, and interest is a routine aspect of criminal justice.

Importantly, neither society nor punishment theory should ignore the suffering that punishment is known to cause, even after it has been imposed.<sup>337</sup> Indeed, there is no reason to exclude the acknowledgment of suffering from the framing of punishments in the first place.<sup>338</sup> Although the state generally tries to punish serious crimes more severely by imposing a more negative experience for greater offenses,<sup>339</sup> this balancing act backfires when it comes to the imposition of cash register justice. Far too often, seemingly minor punishment results in extremely negative experience, with long-lasting consequences.

<sup>332</sup> See *id.* at 1569–70.

<sup>333</sup> See *id.* 1573.

<sup>334</sup> See Joe Pinsker, *Finland: Home of the \$103,000 Speeding Ticket*, THE ATLANTIC (Mar. 12, 2015), <http://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/> [<https://perma.cc/XM5J-TUBQ>].

<sup>335</sup> See John Bronsteen, Christopher Buccafusco, & Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1466 (2010). The authors focus primarily on the effects of imprisonment on offenders, but their points apply to punitive financial sanctions as well. See *id.*

<sup>336</sup> See *id.*

<sup>337</sup> See *id.* The authors specifically reference post-incarceration suffering, but their point is easily broadened to the suffering caused after the imposition of criminal justice debt. See *id.*

<sup>338</sup> See *id.*

<sup>339</sup> See *id.* at 1480.

Moreover, if retributive theories of punishment truly value proportionality, then a proper accounting of retributive punishment should account for any “expected negative hedonic effects” associated with the given punishment,<sup>340</sup> whether those effects are unemployment, bankruptcy, extra imprisonment, or near-total impoverishment. The fact that some of these negative results were not specifically intended by the state should not matter.<sup>341</sup> A state actor cannot simply close her eyes to the obvious repercussions to avoid responsibility.

The effects of criminal justice debt should be more than reasonably foreseeable to state or local authorities.<sup>342</sup> The harsh effects stemming from criminal justice debt have been readily observable for the past ten years. The numerous studies, journalism, policy reports, and judicial commentary demonstrate the government’s presumed level of knowledge about the devastating effects of criminal justice debt. The question then becomes: how to best attack the problem given the constraints of the state and local criminal justice system?

#### IV. COMMUNITY SOLUTIONS

As the late Bill Stuntz observed, the county, or local community, still remains the major unit of governing criminal justice.<sup>343</sup> In his last book, Stuntz embraced a form of democratic populism in local justice, envisioning a criminal justice system where the jury system would be used frequently and efficiently,<sup>344</sup> jurors would be defendants’ actual peers and neighbors, and the jury might even be able to determine issues of law as well as fact.<sup>345</sup> Of course, this vision of local criminal justice is unlikely to be fully realized any time soon. There are ways, however, to make the community more involved in the criminal justice system.<sup>346</sup>

One way to properly engage the community in the workings of criminal justice is to involve it in all aspects of criminal process, including the world of criminal justice debt described above. There are a variety of methods to incorporate community decisions and beliefs into our current labyrinth of financial sanctions, some relatively simple, some more complex.

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<sup>340</sup> *See id.* at 1482.

<sup>341</sup> *See id.* at 1491. As the authors elaborate, punishment is often viewed as a form of communication by the state to the offender, and intent is not important to the practice of this communication. *See id.* Certainly, the imposition of endless, accretive legal financial obligations is a form of communication to an offender that she is being punished, even if the state has not specifically thought out how all these sanctions combine to intensify the punishment.

<sup>342</sup> *See id.* at 1482.

<sup>343</sup> *See* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 6 (2011).

<sup>344</sup> *See id.* at 304.

<sup>345</sup> *See id.* at 302–04.

<sup>346</sup> *See generally* LAURA I. APPELMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* (2015) (advocating for greater citizen involvement in the criminal justice system).

The current system of criminal debt creates enormous costs for everyone: not simply the individuals ensnared in the criminal justice system but also states, counties, and local communities as well. The resounding failure of the criminal justice process to solve any of the problems created by such financial penalties points to the need for community sanctions, public involvement, and local interaction. If the imposition of criminal justice debt had more community input, offenders would have a better chance to receive fair and proportional sanctions because the community would be more familiar with their financial limits. Additionally, community sanctions often provide a measure of restorative justice for both the victims and the community, something that neither court nor administratively-ordered sanctions provide.

The aggressive debt assignment and collection practices detailed in this Article create barriers to successful community reintegration after the formal punishment has ended.<sup>347</sup> Indeed, “the widespread practice in American law is to impose economic penalties with uncertain chances of collection and with insufficient concern for their long-term impact on offender reintegration, recidivism, and public safety.”<sup>348</sup>

Reintegrating the offender back into society is best done by involving the community.<sup>349</sup> A natural extension of this idea would be to involve communities in determining punitive financial sanctions, particularly in the evaluation of whether a particular offender can afford them. This Part discusses some of the most promising innovations for community participation in criminal justice below, including community prosecution, community courts, community policing, and other targeted strategies.

### A. Community Prosecution

Community prosecution gets local citizens directly involved in preventing unnecessary imposition of financial sanctions. Pioneered in Denver, Colorado<sup>350</sup> and Milwaukee, Wisconsin,<sup>351</sup> community prosecution involves assigning

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<sup>347</sup> See Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1838 (2015).

<sup>348</sup> Kevin Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1739 (2015).

<sup>349</sup> See APPLEMAN, *supra* note 346, at 191–209.

<sup>350</sup> See *Denver’s Community Justice Councils*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/research/denver%E2%80%99s-community-justice-councils> [<https://perma.cc/5T9V-KBG9>] (last visited Oct. 6, 2016). Denver has created community justice councils, with each council consisting of twenty to thirty-five members who are chosen by community prosecutors, including residents, business leaders, community center directors, faith leaders, school teachers, community police officers, prosecutors, and elected city and state representatives. *See id.*

<sup>351</sup> See JOHN T. CHISHOLM, MILWAUKEE CTY. DIST. ATTORNEY’S OFFICE, *THE MILWAUKEE COMMUNITY PROSECUTION MODEL: A VISION OF SMART, EFFICIENT, AND EFFECTIVE LAW EN-*



local prosecutors to individual neighborhoods. Within each neighborhood, these prosecutors develop partnerships with neighborhood organizations, working one-on-one with community members to help create prevention strategies to reduce both crime and arrests.<sup>352</sup> In addition, the community prosecutors, with the help of local citizens and community leaders, are able to identify at-risk individuals, and help keep them out of the criminal justice system.<sup>353</sup> As the Milwaukee community prosecutor's program explained:

As community prosecutors . . . we are asked to become part of a Milwaukee community, learn that community's strengths and weaknesses, communicate daily with residents and neighborhood associations and the Milwaukee Police Department, and then formulate appropriate crime prevention strategies . . . . Community prosecutors work closely with the police department, the courts, the Department of Corrections, community based organizations, residents, the City, and the State to improve our criminal justice system by making it cost-effective, fair, evidence-based, and just for the community it serves.<sup>354</sup>

Most importantly, community prosecutor programs constantly communicate with local residents, businesses, associations, and community organizations.<sup>355</sup> There is a lot of communication between citizens and police, both formally and informally.<sup>356</sup> Additionally, community prosecutor programs help smooth an offender's re-entry into the neighborhood by working closely with community organizations, corrections, and courts, ensuring that released offenders are able to follow the requirements of their post-release conditions and get the support they need to make recidivism less likely.<sup>357</sup> These sorts of community efforts help solve the criminal justice debt problem by eliminating its core source—entry into the criminal justice system into the first place—and help reduce the rate of recidivism.

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FORCEMENT 2. One aspect of Milwaukee's model of community prosecution focuses on how "[e]fficient criminal justice that protects the community to the greatest extent requires thoughtful decisions on how to best use our limited law enforcement and court resources." *Id.*

<sup>352</sup> *See id.* at 2–3.

<sup>353</sup> *See id.* at 4.

<sup>354</sup> *Id.* at 2.

<sup>355</sup> *Id.*

<sup>356</sup> *See id.* at 4.

<sup>357</sup> *See id.* at 3.

### B. Community Courts

Similarly, the establishment of community courts can give the community a way to lessen the punishment imposed by criminal justice debt. In general, community courts tend to be neighborhood-focused courts that use the justice system to address local problems.<sup>358</sup> Their goal is to engage outside stakeholders and create greater community trust in the justice.<sup>359</sup> Community courts attempt to innovate new approaches to reduce both crime and incarceration for the betterment of the general community.<sup>360</sup>

For example, the neighborhood of Red Hook in Brooklyn, New York has run a community justice center for the last two decades and has greatly reduced both fines and jail time for offenders.<sup>361</sup> Offenders who are processed through the Red Hook Community Justice Center are given sentences that include drug treatment, job training, and mandatory community service.<sup>362</sup> The Red Hook Court hears mostly “quality of life” crimes such as “vandalism, drug possession, and trespassing.”<sup>363</sup> Most sentences include combinations of community service projects with social services offering many of these services such as GED classes and trauma counseling on-site for better access.<sup>364</sup>

Community courts like Red Hook establish a dialogue with community institutions and residents and seek community-level outcomes such as reductions in neighborhood crime or repairing conditions of disorder through community service.<sup>365</sup> These courts also help create a system where the majority of defendants receive short-term community service or social sanctions, typically within five days or fewer.<sup>366</sup>

When community courts handle the quality of life crimes in a local neighborhood, criminal courts are able to focus their attention on more serious

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<sup>358</sup> See *Community Court: Overview*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/topic/community-court> [https://perma.cc/7SEP-R8B4] (last visited Sept. 5, 2016).

<sup>359</sup> See *id.*

<sup>360</sup> See *id.*

<sup>361</sup> See CYNTHIA G. LEE, FRED L. CHEESMAN, DAVID B. ROTTMAN, RACHEL SWANER, SUVI LAMBSON, MIKE REMPEL & RIC CURTIS, NAT’L CTR. FOR STATE COURTS, *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 1–8* (2013).

<sup>362</sup> See Tricia L. Nadolny, *Philadelphia Officials Weighing an Alternative to Regular Criminal Court*, PHILLY.COM (Aug. 13, 2015), [http://articles.philly.com/2015-08-13/news/65495030\\_1\\_community-court-drug-treatment-ged-classes](http://articles.philly.com/2015-08-13/news/65495030_1_community-court-drug-treatment-ged-classes) [https://perma.cc/KNG2-SX8Y].

<sup>363</sup> *Id.*

<sup>364</sup> See *id.*

<sup>365</sup> See LEE ET AL., *supra* note 361, at 3–4.

<sup>366</sup> See *id.* at 4.

and violent crimes.<sup>367</sup> In turn, the community courts can work with defendants to address some of the root causes of their offenses, which often result from mental illness and substance abuse.<sup>368</sup> In general, community courts are designed to process offenders through the justice system as quickly as possible, minimizing costs in both the short and long run.<sup>369</sup> Although there has not yet been a full-scale study of the long-term results of community courts, one study of San Francisco's Tenderloin Community Justice Center showed a recidivism decline of eight to ten percent within the year.<sup>370</sup> Using community courts to impose criminal justice debt makes it much more likely that, when criminal justice debt is imposed, it will be tied to an offender's actual financial abilities, thus avoiding some of the myriad additional punishments that unpaid financial sanctions can bring.

### C. Community Policing

The practice of community policing is closely related to community prosecution and community courts. This form of policing tries to address the roots of crime and social disorder through "problem-solving strategies and police-community partnerships."<sup>371</sup> Community policing aims to establish partnerships between residents and law enforcement, teach officers about local concerns, and hopefully improve frayed relations with skeptical communities.

Like community prosecution, community policing provides an opportunity to prevent the levying of financial sanctions by reducing the number of arrests. For example, Rockaway Beach, New York has implemented a community policing strategy that shrunk the low-level arrests for bicycling, spitting on the sidewalk, and jaywalking while attempting to improve community relations.<sup>372</sup> Obviously, lessening the number of the arrests that result in financial sanctions can have a huge impact on reducing the amount of criminal justice debt owed.

Moreover, having the community involved in both policing and the court system helps better interpret and enforce constitutional rights. Given the vast reach of the criminal justice system, the courts alone cannot effectively regu-

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<sup>367</sup> See Henry Gass, *Community Courts Let the Punishment Fit the Crime, Compassionately*, CHRISTIAN SCI. MONITOR (Jan. 10, 2015), <http://www.csmonitor.com/USA/Justice/2015/0110/Community-courts-let-the-punishment-fit-the-crime-compassionately> [https://perma.cc/8EZK-PD42].

<sup>368</sup> See *id.*

<sup>369</sup> See *id.*

<sup>370</sup> See *id.*

<sup>371</sup> See *Community Policing*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=81> [https://perma.cc/3Y2A-JCWN] (last visited Sept. 6, 2016).

<sup>372</sup> See J. David Goodman, *In New York, Testing Grounds for Community Policing*, N.Y. TIMES (Aug. 23, 2015), <http://www.nytimes.com/2015/08/24/nyregion/for-new-york-police-a-radical-change-for-queens-residents-a-step.html> [https://perma.cc/ZUJ2-VD72].

late the police or ensure that constitutional protections are implemented.<sup>373</sup> In a system where every arrest harms not only an individual but also, potentially, a community, community policing can be a great help.<sup>374</sup> Arrests, indictments, convictions, and incarceration all impose costs—both on the offender and her community. These costs are unevenly distributed; in many cities, a small subsection of local citizens pay a high price for the costs of ordinary policing.<sup>375</sup> This is where the local community must come in: to help create a system that determines the best and most appropriate sanctions for offenders and their community at large.

Having a community prosecution program, community policing, or community courts are, of course, more expansive methods of involving local citizens and reducing criminal justice debt. There are, however, smaller, more directed ways, described below, to get the community involved in lightening the burden of these crushing financial sanctions.

#### *D. Targeted Strategies: Small Measures, Big Rewards*

##### 1. Community Supervision

Community supervision for released offenders is a more targeted way to reduce criminal justice debt. For example, the state of Georgia recently implemented an automated reporting system for the roughly eighty thousand low-risk probationers under its supervision.<sup>376</sup> Instead of expensive gadgets and probation officer visits, Georgia's program utilizes a call-in program, where released offenders call an 800 number each month to report their status to an automated system instead of reporting in person to a probation officer.<sup>377</sup> This lowered the price tag of probation per offender from \$1.68 to \$0.45 per day, savings that could be passed on to the released offender.<sup>378</sup>

Likewise, in Portland, Oregon, development of the Community Probation Program, which partners local community members with prosecutors and probation officers, has had positive results.<sup>379</sup> Believing that neighborhood residents are in the best position to monitor the probationers' behavior, the Multnomah District Attorney's office permits some offenders to serve out their

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<sup>373</sup> See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012).

<sup>374</sup> See *id.* at 778.

<sup>375</sup> See *id.* at 812.

<sup>376</sup> See Jennifer Ginn, *Georgia Probation Program Lets Some Offenders Phone It in*, CAPITOL IDEAS E-NEWSL. (The Council of State Gov't), Jul./Aug. 2016, [http://www.csg.org/pubs/capitolideas/news/issue100\\_2.aspx](http://www.csg.org/pubs/capitolideas/news/issue100_2.aspx). [<https://perma.cc/S252-8UMX>].

<sup>377</sup> See *id.*

<sup>378</sup> See *id.*

<sup>379</sup> See AM. PROSECUTORS RESEARCH INST., CRIMINAL PROSECUTION DIV., COMMUNITY PROSECUTION: A GUIDE FOR PROSECUTORS 55.

probation in the neighborhood where the crime was committed.<sup>380</sup> As the program innovators noted, “[t]his especially is appropriate for those persons convicted of operating a drug house from a home that they own and within which they continue to reside.”<sup>381</sup> This is an excellent example of how the community can have a direct impact on an offender’s punishment, by not only helping monitor her activities but also reintegrating her back into the neighborhood.

Similarly, Richmond, Virginia runs a “Day Reporting Center” (“DRC”), which provides a one-stop, non-incarcerative, no-fine, community-based sentencing option to offenders.<sup>382</sup> The screened participants remain in the community in lieu of a jail sentence, initially reporting daily to the DRC.<sup>383</sup> Instead of punishment or punitive financial sanctions, the participants receive structured support and classes to address unhealthy behaviors, substance abuse, anger management, education, job readiness, and life skills.<sup>384</sup> Additional support includes relapse prevention, mental health assessments, and family counseling.<sup>385</sup> In addition, the DRC monitors participants with “daily check-ins, regular drug and alcohol testing, and intensive case management.”<sup>386</sup> Finally, participants perform community labor as a condition to the program, helping reintegrate them back into their own communities.<sup>387</sup>

Perhaps most crucially, the goal of Virginia’s DRC is to help offenders gain structure and stability in their lives and change the way they think and behave—in other words, not merely to punish, but to help reform, all in the bosom of their own neighborhoods.<sup>388</sup> The hope is that participants will learn and practice the skills necessary to live responsible lives and will be ready to obtain gainful employment following their time in the Center.<sup>389</sup>

In sum, community probation programs like those in Georgia, Oregon, and Virginia help increase community participation in imposition of punishment and reduce criminal justice debt in a few ways. First, having community members assist in monitoring probationers allows neighborhood residents to decide what kind of treatment an offender most deserves, whether it is continued probation, re-incarceration, or lessened restrictions on behavior. Addition-

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<sup>380</sup> *See id.*

<sup>381</sup> *See id.*

<sup>382</sup> *See* CITY OF RICHMOND COMMUNITY CRIMINAL JUSTICE BOARD, BIENNIAL PLAN 2014–2015, at 16 (2013), <http://www.richmondgov.com/JusticeServices/documents/CCJB2014-15.pdf> [<https://perma.cc/3THL-VUW2>].

<sup>383</sup> *See id.*

<sup>384</sup> *See id.*

<sup>385</sup> *See id.*

<sup>386</sup> *See id.*

<sup>387</sup> *See id.*

<sup>388</sup> *See id.*

<sup>389</sup> *See id.*

ally, the program's participants are required to physically and psychologically invest in their community, since, as a condition of their probation, they must engage in various community activities such as attending community meetings, painting homes, removing broken glass, and collecting trash.<sup>390</sup> This helps reintegrate offenders into their communities even before they finish serving their sentence, which in turn hopefully reduces the rates of recidivism.

## 2. Community and City Bail

Community and city bail is another, more intimate way for the local public to get involved in reducing criminal justice debt. In New York, the New York City Council recently earmarked 1.4 million dollars for a city-wide bail fund for low-level offenders.<sup>391</sup> The bail fund requires only minimal supervisory requirements for pre-trial released offenders; the only conditions for release are whatever check-ins required by the provider of the funds.<sup>392</sup> Any added services, like referrals to drug or alcohol rehabilitation, are entirely voluntary on the part of the offender.<sup>393</sup>

New York City's new local bail fund follows the lead started by a number of smaller bail funds in the area—the most prominent being The Bronx Freedom Fund,<sup>394</sup> established in 2007 in association with The Bronx Defenders, a New York City public defender organization.<sup>395</sup> The Bronx Freedom Fund is a rotating community criminal bail fund that posts bail for poor South Bronx residents charged with misdemeanors.<sup>396</sup> The Freedom Fund has posted bail for approximately four hundred clients since opening and ninety-six percent of their clients return to their scheduled court dates.<sup>397</sup> In addition, since the government returns bail at the close of an offender's criminal case, The Freedom Fund is able to re-use its funds several times per year, remaining largely self-sustaining.

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<sup>390</sup> See AM. PROSECUTORS RESEARCH INST., *supra* note 379, at 55.

<sup>391</sup> See Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG., Aug. 16, 2015, at MM38, <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/GTG9-7U48>].

<sup>392</sup> See Chris Peak, *Each Day, 731,000 People Are in Jail. How Many Are There Simply Because They Can't Afford to Make Bail?*, NATION SWELL (July 29, 2015), <http://nationswell.com/new-york-city-reform-bail-no-jail/> [<https://perma.cc/U5E2-NCXR>].

<sup>393</sup> See *id.*

<sup>394</sup> See THE BRONX FREEDOM FUND, <http://www.thebronxfreedomfund.org/> [<https://perma.cc/K3GV-QMZG>] (last visited Sep. 5, 2016).

<sup>395</sup> See Peak, *supra* note 392; see also THE BRONX DEFENDERS, <http://www.bronxdefenders.org/> [<https://perma.cc/7AS5-238U>] (last visited Sep. 5, 2016).

<sup>396</sup> See *Our Mission*, THE BRONX FREEDOM FUND, <http://www.thebronxfreedomfund.org/what-we-do/> [<https://perma.cc/P3YU-ABP9>] (last visited Oct. 6, 2016).

<sup>397</sup> See *Results*, THE BRONX FREEDOM FUND, <http://www.thebronxfreedomfund.org/our-results/> [<https://perma.cc/A23M-VAD9>] (last visited Oct. 6, 2016).

Equally important, the citizens assisted by The Bronx Freedom Fund are not only given access to cash bail but are also connected to services and support for the duration of their cases. This effort helps ensure that the actions of The Freedom Fund do not merely provide short-term relief and instead grants offenders the assistance they might need to stabilize their lives in the long term.<sup>398</sup>

Similarly, a variety of places, including Washington, D.C.,<sup>399</sup> Baltimore,<sup>400</sup> Chicago, Charlotte, Phoenix, Kentucky,<sup>401</sup> and New Jersey<sup>402</sup> have begun programs that release low-level offenders on bail. In Kentucky, for example, the state has begun a relatively new program that allows for deferred prosecution for those offenders charged with first or second offenses of Possession of a Controlled Substance in the First Degree, a class D felony.<sup>403</sup> If the accused successfully completes the community-based treatment, her charges are dismissed and all her records are sealed.<sup>404</sup> Most important, the accused are not required to admit guilt to participate in Deferred Prosecution; it is truly a *pre-trial* program.<sup>405</sup>

Kentucky also has a Monitored Conditional Release program, which tries to reduce unnecessary detention of pretrial offenders.<sup>406</sup> As the Kentucky Department of Justice notes, “Pretrial Services supervision not only provides for safe communities, it allows defendants to become productive citizens because they can return to work, jobs and families as well as seek counseling or treatment.”<sup>407</sup> This ensures that defendants do not get caught in the spiral of debt and destitution that harsh monetary fines and fees can create. Finally, Kentucky also implemented a program that credited each jailed offender one hundred dollars per day toward payment of bail for each day they served in jail prior to trial, thus facilitating their release.<sup>408</sup>

One common aspect of all of these bail programs is that released offenders need only to check in occasionally with a supervisor, either through text

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<sup>398</sup> See *Our Mission*, THE BRONX FREEDOM FUND, *supra* note 396.

<sup>399</sup> See KIDEUK KIM & MEGAN DENVER, A CASE STUDY ON THE PRACTICE OF PRETRIAL SERVICES AND RISK ASSESSMENT IN THREE CITIES 7–10 (2011).

<sup>400</sup> See *id.* at 14–16.

<sup>401</sup> See MARK HEYERLY, ADMIN. OFFICE OF THE COURTS, KY. COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY 8 (2013); Peak, *supra* note 392.

<sup>402</sup> See Press Release, Drug Policy Alliance, New Jersey Voters Reform Broken Bail System, Drug Policy News (November 4, 2014), <http://www.drugpolicy.org/news/2014/11/new-jersey-voters-reform-broken-bail-system> [https://perma.cc/TQP9-NJ8H].

<sup>403</sup> See HEYERLY, *supra* note 401, at 8.

<sup>404</sup> See *id.*

<sup>405</sup> See *id.*

<sup>406</sup> See *id.* at 6.

<sup>407</sup> See *id.*

<sup>408</sup> See *id.* at 14.

message, visits with case managers, or other easy check-ins to ensure that these released offenders do not miss their court date.<sup>409</sup> These minor requirements are far less onerous than either staying in jail due to insufficient funds or incurring the heavy—and costly—supervision usually provided by pretrial supervision services.<sup>410</sup>

Of course, all of these community and city bail funds primarily post monies for misdemeanor offenders, thus still leaving unrelieved the large contingent of those people arrested for felony offenses. What is needed in tandem with these local bail funds, although admittedly far more difficult to achieve, is pressure on lawmakers to reform the arrest procedure itself.

### 3. Reforming the Arrest Procedure

Reforming a city or county's arrest procedure may seem an impossible feat, but the reforms made in Ferguson, Missouri show one possible way if used in combination with other tactics. Due in part to the unrelenting community, social, and media pressure on the city, Ferguson Municipal Court Judge Donald McCullin ordered that all arrest warrants issued in the city before December 31, 2014 be withdrawn.<sup>411</sup> Judge McCullin also ordered that all defendants would receive new court dates along with options for disposing of their cases, such as payment plans or community service.<sup>412</sup> Finally, some fines were commuted for indigent offenders.<sup>413</sup>

In part, this dramatic change can be attributed to the DOJ's damning report, which charged that the police force and court worked together to exploit people in order to raise revenue.<sup>414</sup> Some of this turn-around in policy,<sup>415</sup> however, should be credited to the great outcry, in both the local and the wider national community, about the situation in Ferguson over the past few years.

Likewise, some of the public outcry over misdemeanor criminal justice debt has prompted a federal lawsuit that is suing courts nationwide for jailing

<sup>409</sup> See Peak, *supra* note 392.

<sup>410</sup> See Robin Steinberg & David Feige, *The Problem with NYC's Bail Reform*, MARSHALL PROJECT (July 9, 2015), <https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform> [<https://perma.cc/5PQG-DGQM>].

<sup>411</sup> See Greg Botelho & Sara Sidner, *Ferguson Judge Withdraws All Arrest Warrants Before 2015*, CNN (Aug. 25, 2015), <http://www.cnn.com/2015/08/24/us/ferguson-missouri-court-changes/> [<https://perma.cc/VEW3-FY74>].

<sup>412</sup> See *id.*

<sup>413</sup> See *id.*

<sup>414</sup> See U.S. DEP'T OF JUSTICE, *supra* note 248, at 2.

<sup>415</sup> As of February 10, 2016, the City of Ferguson rejected the proposed change to their criminal justice system, leading the DOJ to file a civil rights lawsuit. See Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/justice-department-sues-ferguson-over-police-deal.html> [<https://perma.cc/Z4J8-A79T>].



defendants unable to afford their bail, court fines, and probation fees.<sup>416</sup> Equal Justice Under Law, a non-profit organization, filed a lawsuit against Rutherford County, Tennessee and Providence Community Corrections (“PCC”), charging that PCC ran “‘an extortion scheme’ that ‘conspired to extract as much money as possible’ from people who were threatened with jail time if they couldn’t pay court fees and fines.”<sup>417</sup> In five years, PCC collected over seventeen million dollars from probationers in Rutherford County.<sup>418</sup> The lawsuit, brought under the Racketeer Influenced and Corrupt Organizations Act, accuses PCC and Rutherford County of running a “racketeering enterprise” that misappropriates “the probation supervision process for profit.”<sup>419</sup> Although the outcome of the lawsuit is not yet determined, hopefully the publicity it raises will make other counties more likely to review their imposition of ever-increasing financial sanctions on offenders.

#### 4. Community Support for Modifying Civil Assessments

Unpaid civil assessments can also lead to criminal charges, and there are a few types of community supports to assist offenders in these matters. For example, in Missouri, an offender facing criminal charges for child support delinquency can be referred to Helping Parents Help Children, a joint project run by Missouri public defenders, Missouri prosecutors, and the Legal Services of Southern Missouri.<sup>420</sup> The program helps offending parents modify their monthly child support to an affordable level, thus permitting them to meet their obligations without prompting recurring criminal charges and financial penalties.<sup>421</sup>

Like so many of the possibilities discussed above, these types of local, community-based solutions can help people resolve their crushing criminal justice debt, “saving their money and their dignity while satisfying creditors instead of slipping into a shadowy existence.”<sup>422</sup> Although paying child sup-

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<sup>416</sup> See Alysia Santo, *How to Fight Modern Day Debtors Prison? Sue the Courts*, MARSHALL PROJECT (Oct. 1, 2015), <https://www.themarshallproject.org/2015/10/01/how-to-fight-modern-day-debtors-prisons-sue-the-courts> [<https://perma.cc/5J63-9GGF>].

<sup>417</sup> *See id.*

<sup>418</sup> *See id.*

<sup>419</sup> *See id.*

<sup>420</sup> *See Legal Services and Public Defenders Launch Pilot for Parents Faced with Non-Support Charges*, MISSOURI B., <http://www.mobarprobono.net/index.php/real-qlife-changingq-work-for-lawyers/legal-services-and-public-defenders-launch-pilot-for-parents-faced-with-non-support-charges> [<https://perma.cc/6MC6-S32P>] (last visited Sept. 5, 2016).

<sup>421</sup> *See* David Udell, *For Criminal Justice Reform, Look to Civil Legal Aid*, AL JAZEERA AM. (Sept. 5, 2015), <http://america.aljazeera.com/opinions/2015/9/for-criminal-justice-reform-look-to-civil-legal-aid.html> [<https://perma.cc/2YN2-QMPZ>].

<sup>422</sup> *See id.*

port is an important obligation, criminalizing the failure to pay and imposing incarceration does little to get the necessary funds to the dependent child. Because imprisonment eliminates the offender's ability to pay, having a more flexible arrangement for child support obligations both reduces the extra charges on an offender as well helps provide more money for dependent children.

## 5. Community Legal Assistance from Non-Lawyers

One final solution is to move some community assistance for offenders out of the legal sphere, allowing non-lawyers to participate as well. To this end, some communities are contemplating permitting non-lawyers to provide a broad range of legal services.<sup>423</sup> Various courts, state bars, legal task forces, and scholars have endorsed new roles for trained community members to provide multiple forms of legal assistance in non-profit and for-profit settings, with and without attorney supervision, in and outside the courtroom.<sup>424</sup>

To fully realize this option, of course, would require an exception to our traditional legal rules prohibiting non-lawyers from practicing law. Nonetheless, several states have begun a process to assist in democratizing criminal justice. For example, Washington state has approved roles for "limited license legal technicians."<sup>425</sup> New York has authorized pilot programs for court-based "navigators"<sup>426</sup> and is considering steps to authorize advocacy roles for court aides in evictions and debt collection proceedings.<sup>427</sup> In addition, California has expressed interest in examining a limited-practice licensing program that would create a new class of special professionals who could give legal advice.<sup>428</sup>

Although not all of these innovations specifically address criminal justice debt, they provide a model for approaches that both involve the local community and think creatively. As former New York Court of Appeals Chief Judge

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<sup>423</sup> See *Research*, NAT'L CTR. ACCESS TO JUST., <http://ncforaj.org/new-models-of-support-for-unrepresented-litigants> [https://perma.cc/Z4M5-NU8H] (last visited Sept. 5, 2016).

<sup>424</sup> See *id.*

<sup>425</sup> See *Limited License Legal Technician Program*, WASH. ST. B. ASS'N, <http://www.wsba.org/licensing-andlawyer-conduct/limited-licenses/legal-technicians> [https://perma.cc/5XHT-H6BR] (last visited Oct. 6, 2016).

<sup>426</sup> See *Court Navigator Program*, N.Y. COURTS, <http://www.courts.state.ny.us/courts/nyc/housing/rap.shtml> [https://perma.cc/YA24-S3HH] (last visited Sept 5, 2016).

<sup>427</sup> See Richard Zorza, *Steps in New York Underline Speed of Acceptance of "Roles Beyond Lawyers,"* ACCESS TO JUST. BLOG (Mar. 31, 2015), <https://accesstojustice.net/2015/03/31/steps-in-new-york-underline-speed-of-acceptance-of-roles-beyond-lawyers/> [https://perma.cc/YR8X-GRSA].

<sup>428</sup> See Laura Ernde, *State Bar to Look at Limited-Practice Licensing Program*, CAL. B. J. (Feb. 2013), <http://www.calbarjournal.com/February2013/TopHeadlines/TH1.aspx> [https://perma.cc/5947-GUVS].

Jonathan Lippman contended, “Even with whatever success we’ve had with public funding of legal services and pro bono work by lawyers, there is still a gaping hole in our system of providing legal services to the poor and people of limited means.”<sup>429</sup> Coming up with innovative solutions involving the community, as discussed above, may be the most realistic way to combat the specter of cash register justice.

## CONCLUSION

Rising expense in the criminal justice system and shrinking public budgets have resulted in a cost transfer from state and county courts to those arrested, indicted, and convicted, imposing a heavy burden of criminal justice debt on a largely indigent population. In an ideal world, the market pressures forcing indigent defendants to bear the monetary costs would be eradicated<sup>430</sup> by a fresh influx of funds from the state and federal government. In the real world, however, the practice of having offenders funding the court system is unlikely to end any time soon. So what are the best strategies to attack criminal justice debt, solutions that have potential to change practices without shifting the cost structure back onto cash-strapped local and state governments?

There has been some positive nationwide change regarding criminal justice debt. As discussed throughout this Article, the DOJ’s Civil Rights Division promulgated a lengthy report on Ferguson’s debt imposition, and the Center for Equal Justice has brought lawsuits to force courts to end debtor’s prison. These tactics, however, are not sustainable ways to bring about long-term change. State and local court systems depend on the revenue scraped from the backs of the poor, and it seems unlikely that the work of either the federal government or non-profit advocates like Equal Justice Under Law will be able to force all criminal court systems to stop the practice. The change has been slow even in cities like Ferguson, where the problems have been highly publicized.<sup>431</sup> Nor will the DOJ’s attempts to “incentiviz[e] local jurisdictions to move away from

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<sup>429</sup> See Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABAJ. (Jan. 1, 2015), [http://www.abajournal.com/magazine/article/washington\\_state\\_moves\\_around\\_upl\\_using\\_legal\\_technicians\\_to\\_help\\_close\\_the](http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the) [https://perma.cc/4B5T-Z9M3].

<sup>430</sup> The *Model Penal Code (Second)* categorically states that “[n]o convicted offender . . . shall be held responsible for the payment of costs, fees, and assessments.” See MODEL PENAL CODE: SENTENCING § 6.04(A)–(D) (AM. LAW INST., Tentative Draft No. 3, 2014); see also Reitz, *supra* note 348, at 1757 (describing the lack of information available to apply “Bearden’s ability-to-pay standard” in the real world). Sadly, this pronouncement is unlikely to be followed.

<sup>431</sup> See Ryan J. Reilly & Mariah Stewart, *Ferguson Prosecutor Accused of Misconduct Is Still Crusading Against Ferguson Arrestees*, HUFFINGTON POST (Jul. 2, 2015), [http://www.huffingtonpost.com/2015/07/02/stephanie-karr-ferguson\\_n\\_7707802.html](http://www.huffingtonpost.com/2015/07/02/stephanie-karr-ferguson_n_7707802.html) [https://perma.cc/XTL5-TKNZ].

finances and fees that lead to unnecessary incarceration”<sup>432</sup> be likely to work on a long-term basis, given how tight funds are in most justice systems. Indeed, excessive costs were one of the reasons given by the Ferguson city government in its rejection of the proposed DOJ settlement.<sup>433</sup>

Instead, one of the most innovative and cost-effective ways of reforming the current criminal justice system is getting the community involved in criminal process. Whether this is at the beginning and focused on prevention—like community policing; in the middle and focused on fairness—like community prosecution; or at the end and focused on reintegration into the community, having the local public involved in each step of the criminal justice system will be tremendously beneficial. Community involvement will not only save money but, more importantly, will also promote more accurate and individualized justice.

Cash register justice, in the form of criminal justice debt, is a stain on the criminal justice system. Only by better involving the community, in ways both large and small, will the criminal justice system be able to eradicate its traces.

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<sup>432</sup> See Ryan J. Reilly, *As DOJ Zeros in on Profit-Driven Policing, Advocates Urge Crackdown*, HUFFINGTON POST (Dec. 2, 2015), [http://www.huffingtonpost.com/entry/as-doj-zeros-in-on-profit-driven-policing-advocates-urgecrackdown\\_565dd88ee4b072e9d1c36495](http://www.huffingtonpost.com/entry/as-doj-zeros-in-on-profit-driven-policing-advocates-urgecrackdown_565dd88ee4b072e9d1c36495) [<https://perma.cc/4CXQ-TA8M>].

<sup>433</sup> See Apuzzo, *supra* note 415.

