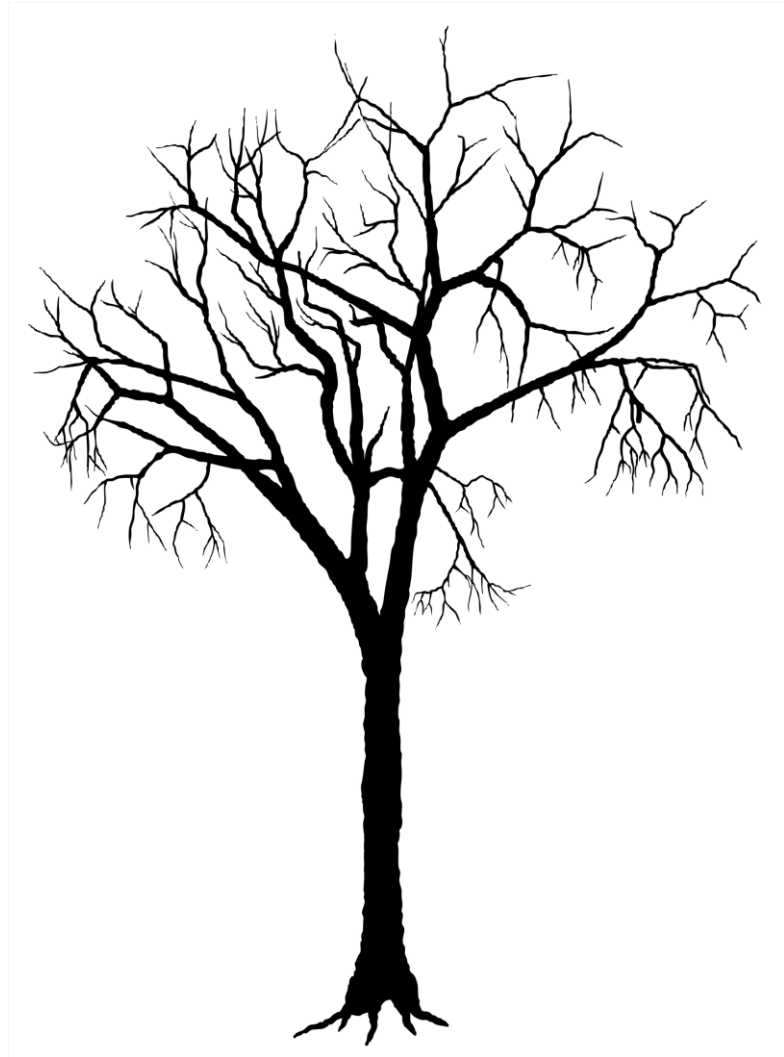


Financialized Courts

The Disparate Impact of
the Municipal Fine
Based Justice System





Authors

Sima Atri
Micaela Alvarez
Donna Harati
Michael Perloff
Alexander Self

Advisors

Lisa Borden
Sarah Geraghty
Thomas Harvey
Alec Karakatstanis
Sarah Stillman

Directors

Jon Hanson & Jacob Lipton

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About the Systemic Justice Project

The Systemic Justice Project (“SJP”) is a policy innovation collaboration, organized and catalyzed by Harvard Law School students devoted to identifying injustice, designing solutions, promoting awareness, and advocating reforms to policymakers, opinion leaders, and the public.

While targeting specific policy challenges, SJP is devoted to understanding common and systemic sources of injustice by analyzing the historical, cultural, political, economic, and psychological context of particular problems. Toward that end, SJP is committed to collaborating with scholars, lawyers, lawmakers, and citizens and to working with existing institutions in promoting attainable, pragmatic, and lasting policy solutions.

SJP, Griswold 403, Harvard Law School, Cambridge, MA 02138

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EXECUTIVE SUMMARY

Municipalities throughout the country balance their budgets on the backs of the poor. Private probation companies collect millions of dollars in unreported 'service fee' revenue. Indigent populations unable to pay fees end up further impoverished and sometimes incarcerated. How did we get here and how do we stop it?

This paper examines the rise of the municipal fine based justice system in state courts across the country. In particular, it explores user-fees associated with misdemeanor offenses and the influence that private probation companies have had in this space. First, this paper will describe the problem, both from the perspective of those affected and by quantifying its aggregate impact. Additionally, it will explain some of the problem's underlying causes, as well as its social, political, legal, and cultural context. Next, it will survey the various tools that activists, lawyers, judges, and policy-makers have employed in response. Finally, it will conclude with a case study, outlining a multi-pronged, systemic solution designed to address the identified roots of the problem, drawing on a combination of the tools presented.

METHODOLOGY

The goal of this report is to identify and analyze a common and persistent injustice, offer a comprehensive description of the issue, and design a systemic solution. After extensive research, focused on the areas of the country where legal financial obligations (LFOs) and private probation are most prevalent, we interviewed a series of activists and lawyers working on the ground, each attacking the system at a different entry point. Building on their knowledge, we propose a system-wide solution comprised of multiple efforts, designed to help dismantle some of this problem's underlying causes.

We acknowledge that resource constraints will not allow for implementation of this approach in every municipality; however we believe that complex problems like this one require multi-faceted solutions that chip away at the common structural sources of injustice in this country. We hope this paper will raise awareness about the disparate impact of the municipal fine based model and the effect of the private probation industry on the misdemeanor probation system.

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Further, we hope our survey of the available tools and proposed systemic approach proves useful to those working to end this practice.

NARRATIVES

The voices of those affected by these practices should be foremost in the minds of those seeking to craft a solution. These stories articulate the magnitude and pervasiveness of the costs inflicted on marginalized populations across the United States and remind us what is at stake. This section presents three illustrative narratives, drawn from the work of the Southern Poverty Law Center and Sarah Stilman of the *New Yorker*, that humanize this problem and demonstrate the havoc it can wreak in the lives of this country's most vulnerable citizens.

HARRIET CLEVELAND

Harriet Cleveland's troubles began in 2008 when a police roadblock went up in her neighborhood. At the time, Ms. Cleveland was driving without insurance, which she couldn't afford. She received a ticket and another fine and lost her license, but continued to drive. As she told the Southern Poverty Law Center: "I knew it was wrong to drive without a license, but I had to take my son to school and to travel to work."

When she was unable to pay her second ticket and fine immediately, a judge sentenced her to two years of probation with Judicial Correction Services (J.C.S.), a for-profit company responsible for collecting fines and administering probation. She would owe J.C.S. two hundred dollars each month, forty for a J.C.S. "supervision" fee. By that summer, Ms. Cleveland's total court costs and fines had soared from a few hundred dollar fine to \$4,713, including more than a thousand dollars in private-probation fees.

That June, Ms. Cleveland received a letter from the District Attorney's office that warned: "Balance Due: \$2,714. You MUST pay this amount in full . . . or you may be arrested." Ms. Cleveland noticed that the amount she owed was far higher than the original fines despite the monthly payments she had been making. The District Attorney later explained that due to her failure to pay, they had doubled her fines, and added a 33% collection fee, a warrant fee, and other surcharges. Terrified of being sent to jail, but broke, Ms. Cleveland failed to appear

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The District Attorney later explained that due to her failure to pay, they had doubled her fines, and added a 33% collection fee, a warrant fee, and other surcharges.

in court. She hoped that her case would go unnoticed until her tax rebate came in January.

Later that summer, while she was at home babysitting her two-year-old grandson, a police officer arrested her and took her to a Montgomery city jail cell. She was sentenced to spend the next month there unless she could come up with seventeen hundred dollars—a policy known as *Pay or Stay*. She slept on the floor, using old blankets to block the sewage from a leaking toilet until the Southern Poverty Law Center negotiated her release.

Figure 1: Harriet Cleveland



Source: Southern Poverty Law Center

The words of Kevin Thompson, another Montgomery resident facing similar treatment for a traffic violation, summarize Ms. Cleveland's predicament: "I begged the judge to help me get a permit so that I could drive for work and to give me some more time to pay. Instead the judge sentenced me to jail."¹

VERA CHEEKS

Vera Cheeks received a \$135 fine for a stop-sign violation in South Georgia. Unable to pay off the fine in full, she was placed on probation, ostensibly to give her more time to pay. However, as with Ms. Cleveland, probation added a seemingly endless litany of fees to her original fine. Moreover, Cheeks was required to report to a meeting once a week and make payments when due or face a warrant for her arrest.

Ms. Cheeks described being placed on a probation payment plan as feeling like a shakedown operation: **"It was like they were thugs and gangsters taxing poor people that don't**

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“It was like they were thugs and gangsters taxing poor people that don’t have income and keeping them in the system, and when they can’t pay, throwing them in jail.”

have income and keeping them in the system, and when they can’t pay, throwing them in jail.” Although she had previously been employed as a pharmacy technician, Ms. Cheeks was not working when she received the ticket because her father was terminally ill. When she showed up for a meeting without payment, she was ordered to pay \$50 or be sent to jail. Her fiancé was forced to pawn her engagement ring so she could leave the building. “It just broke my heart,” Cheeks said.

Figure 2: Vera Cheeks



Source: The Atlanta Journal-Constitution

Ms. Cheeks, now being represented by the Southern Poverty Law Center, indicated that she felt a just system would offer community service requirements or a payment plan without the extra fees. She noted, “if you can’t afford to pay a \$135 ticket, what makes them think you are going to be able to pay \$267, or more, whether they break it down in payments or not?”²

THOMAS BARRETT

Unemployed and living off food stamps, Mr. Barrett was sentenced to pay a \$200 fine after stealing a \$2 can of beer from a convenience store. Unable to pay immediately, he was placed on probation,

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leading to a host of fees, including a \$360 monthly charge for an electronic ankle monitor.

To try to make payments, Mr. Barrett began selling his blood plasma, walking everywhere to save the bus fare, and skipping meals, but his monthly probation fees far exceeded the income he could generate, and his debt continued to grow. Eventually, the protein levels in his blood became so low from skipping meals that the hospital would not accept his blood. He was jailed three separate times for his inability to make payments.³

PROBLEM OVERVIEW

Fees accrue at every stage of a defendant's interaction with the system, essentially turning the right to due process into a cash cow for the court.

Struggling to balance their budgets and seeking new sources of revenue, municipalities across the country are adopting the municipal fine based model and shifting the cost of running court systems from tax-payers to 'offenders'. By implementing an ever-expanding schedule of court fees and fines (also known as legal financial obligations or LFOs), municipalities finance everything from salaries and electric bills to computer upgrades and employee gym memberships.⁴ As the narratives above illustrate, fees accrue at every stage of a defendant's interaction with the system, essentially turning the right to due process into a cash cow for the court. As the cost of access to justice grows, a defendant's ability to avoid jail is increasingly dependent on his or her ability to pay. More specifically, there are five categories of legal financial obligations imposed throughout the process:

- Original fine (stop-sign violation, speeding ticket, driving without a license, civil infraction, criminal violation)
- Pre-conviction fees (application fees, pre-trial jail fees, rental fee for monitoring devices)
- Sentencing fees (restitution, administrative costs, fees for designated funds, public defender, jury, and prosecutor reimbursement fees)
- Incarceration fees (warrant fees, "room and board" fees, health care and other service costs)

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- Probation, Parole, and other Supervision costs (drug testing, DUI, monitoring devices, and mandatory treatment fees)

In addition, ‘poverty penalties’ are added at each stage if the individual is unable to pay immediately. These can include interest and late fees, but also payment plan and collection fees.

Despite a United States Supreme Court ruling that a person may not be incarcerated because of their indigency, misdemeanor courts across the country regularly threaten and punish individuals on probation with jail time if they are unable to pay the fines owed. Those charged with misdemeanors may find themselves on probation for two reasons: they may be placed under supervision as a part of their sentence; or, if sentenced to a fine they cannot pay in full up front, they may be placed on ‘Pay Only’ probation. Instead of evaluating defendants’ indigency status and adjusting fines accordingly, courts force individuals who pose no threat to society into costly probation programs.

“These are people who make the same mistakes you or I do — speeding, not wearing a seatbelt, forgetting to get your car inspected on time. The difference is that they don’t have the money to pay the fines.”

“These aren’t violent criminals,” says Thomas Harvey, one of the three co-founders of ArchCity Defenders. “These are people who make the same mistakes you or I do — speeding, not wearing a seatbelt, forgetting to get your car inspected on time. The difference is that they don’t have the money to pay the fines. Or they have kids, or jobs that don’t allow them to take time off for two or three court appearances. When you can’t pay the fines, you get fined for that, too. And when you can’t get to court, you get an arrest warrant.”⁵

The influence of private probation companies only exacerbates this problem through perverse incentives. Private probation companies approach cash-strapped municipalities with an offer that is hard to refuse: pay us nothing, and we will supervise probation and collect revenues for you. But probation companies don’t just collect the myriad fees and fines imposed by the court, they also charge individuals ‘supervision fees’ for their services, often amounting to hundreds of dollars a month. Beyond service fees, private companies take advantage of every opportunity to extract revenue. Supervision by the company usually entails weekly visits to the court or company office to make payments and meet with a private probation officer. Steep penalties accrue for missed meetings or payments.⁶ With their debt increasing at every turn, individuals often find themselves

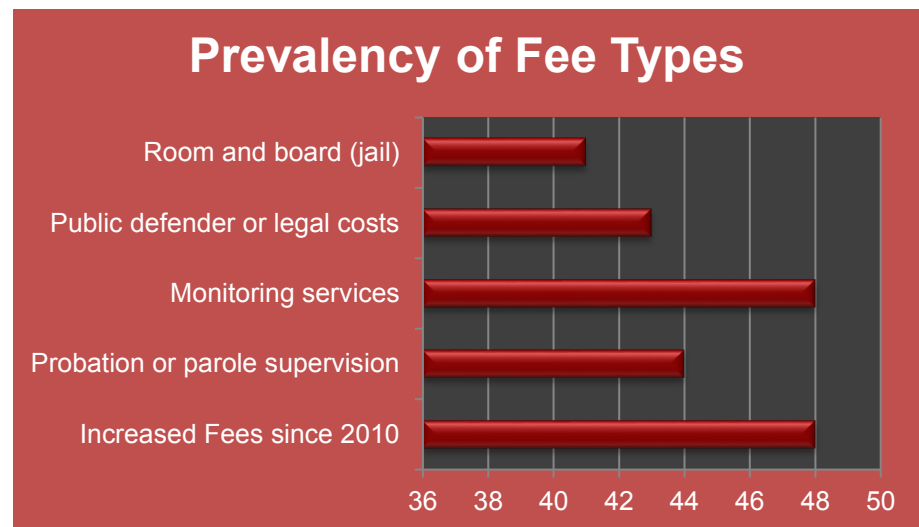
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trapped on probation for years at a time, having paid the value of their original fine many times over.

The stories of those affected attest to the devastating impact of the municipal fine based model. However the scope of this issue is more difficult to quantify. The Department of Justice tracks the number of individuals on probation in each state, but nationwide data on revenue generation from misdemeanor probation is limited.⁷ Almost four million people in the United States were on probation in 2013, which is 1,065 people on probation for every 100,000 adults; however the aggregate amount of each type of LFO assessed is unknown.⁸ What information is available must be cobbled together from state budgets and estimates of private probation company revenues. A survey conducted by the Brennan Center for Justice and the National Center for State Courts catalogued the different fee structures imposed in each state. The results below show that most states impose almost all, if not all, of the types of fees outlined above. Equally as salient: 48 of 50 states have increased their fees since 2010.⁹

Figure 3: Number of states that impose each fee type



Source: National Public Radio, State-By-State Court Fees

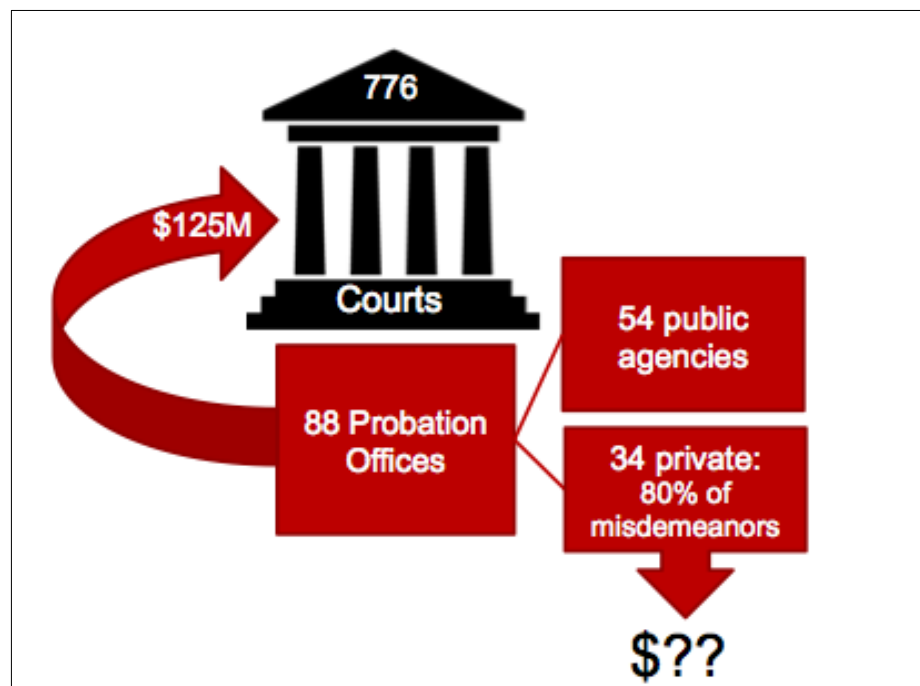
The almost total lack of transparency requirements on private probation companies further obscures the scope of this problem. Private companies provide periodic reporting on the percentage of court-imposed debt they are able to collect; however companies are under no obligation to report to states how much service revenue they extract from individuals on probation.¹⁰

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Georgia has the highest probation rate in the country, reporting 6,829 individuals on probation for every 100,000 adults (four times the national average).¹¹ The state has been a battleground in recent years around this issue, so activists and journalists have been able to estimate the financial scale of misdemeanor LFOs. In Georgia, 80% of misdemeanor probation is managed by private companies, who, along with state-run probation offices, collect over \$125 million per year in court-imposed fees and fines, which is then funneled back into the state budget.¹² A report published in 2014 by Human Rights Watch estimated the additional revenue collected by private probation companies to be at least \$40 million.¹³

Figure 4: Georgia probation system revenue stream diagram



The recent focus on Georgia, along with other well-publicized reform efforts in Alabama and Mississippi, doesn't mean this problem is confined to the South. The municipal fine based model is in place throughout the country, and private probation companies operate in states from Montana to Missouri to Michigan. As will be explicated in more detail in the solution case study below, racial disparities in the number of misdemeanor charges and the burdensome LFOs they carry contributed substantially to the growth of the activist/reform movement in Ferguson following the police killing of Michael Brown.

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CAUSES AND CONTEXT

In seeking to craft a systemic, multi-pronged solution, it is vital to consider both the underlying causes of an issue and the context that allows the problem to be perpetuated. This section examines the factors that explain the rise of the municipal fine based model and the social, cultural, legal, and psychological forces that enable these practices to persist.

UNDER-FUNDED LOCAL GOVERNMENTS

One of the main causes of municipalities' increased reliance on LFOs is that they are one of the few ways that local governments can raise revenue. Local governments have very limited powers. Cities and municipalities are "creatures of the state."¹⁴ Their regulatory authority pales in comparison to that of state governments.¹⁵ Local governments are limited in their ability to raise revenue and often cannot borrow money freely.¹⁶ Furthermore, cities are limited in both the kind of taxes they can impose and the amounts that they can tax within that limited sphere.¹⁷ For the past fifty years, state governments have tightened cities' ability to raise revenue, forcing cities to become ever more creative. Cities increasingly have turned to fees to make up the shortfall but even these are not enough. The increasing restrictions, along with increasing fiscal pressures,¹⁸ have forced local governments into a situation in which they are willing to impose a system of fines and fees that is both fiscally and socially harmful.

In the early days of the United States, towns and cities enjoyed a large amount of autonomy.¹⁹ Their power, however, has declined significantly due to a combination of state legislative and judicial constrictions.²⁰ Cities can fund themselves through taxation and dues. The predominant form of municipal taxation is the property tax.²¹ Some states allow local governments to implement other taxes, such as a sales tax and even an income tax, but these usually play a subsidiary role to the property tax.²² The widespread constriction of opportunities for municipalities to generate revenue through taxation has coincided with a general anti-taxation movement over the past half-century.²³ As just one recent example, California's Proposition 13 sharply restricts municipal property tax.²⁴

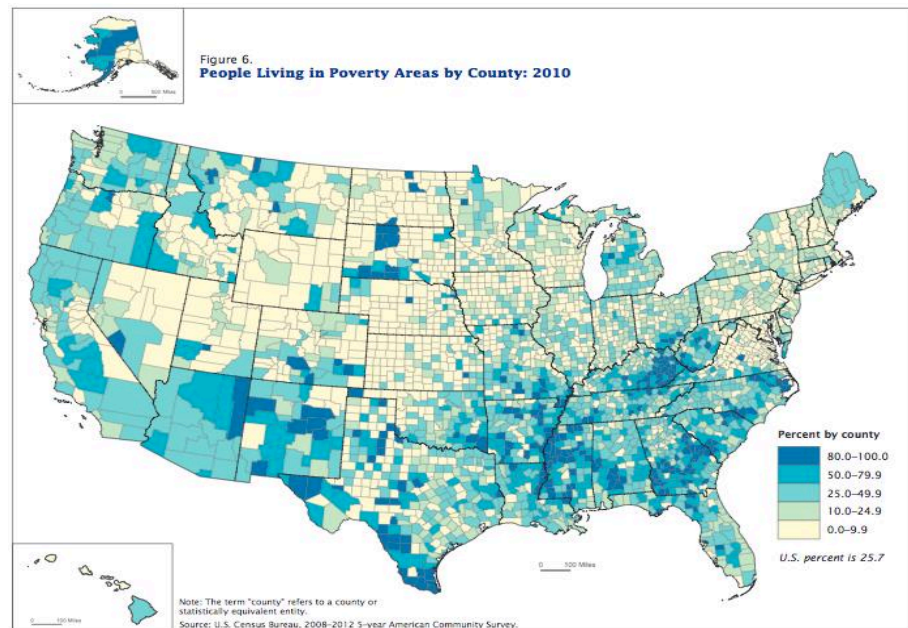
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At the local level, this anti-taxation movement has manifested itself in a trend from taxes to dues.²⁵ The main distinction between the two is that dues involve individual citizens paying for specific services whereas taxes are assessed regardless of the benefit to individual taxpayers.²⁶ The proliferation of these fees is in large part motivated by state and local restrictions on the taxing power.²⁷ One result of using dues is communities segregated based on wealth. Poorer citizens are often priced out of wealthier municipalities via “fiscal zoning,” a requirement that “everyone who lives in the town pays taxes at least equal to the cost of the services they draw.”²⁸²⁹ Yet even if municipalities had an unlimited taxing power, some local communities could still not raise enough revenue to provide adequate services to their citizens.

The problem with property taxes and, indeed, most other local government imposed taxes, is that the amount of revenue they can raise is closely tied to the wealth of the city’s inhabitants. The breakdown of city wealth and, therefore, the revenue that cities enjoy, is not random. City inhabitants often have relatively little choice about the cities they live in. As described above, wealthy white communities often actively exclude the poor and people of color through zoning and other mechanisms. Furthermore, when, against the odds, the poor and people of color do sometimes become a meaningful proportion of a wealthier area’s population, the wealthy often leave, abandoning a poorer town nucleus that cannot afford to provide effective services or that now simply has too many people of color for their tastes.³⁰ Reliance on fees is only one of many reasons why poorer municipalities still cannot afford to provide for their citizenry.

Figure 5: Map of U.S. segregation of wealth by county



Source: U.S. Census Bureau³¹

This wealth stratification of municipalities often happens in a racially segregated manner. This is no accident. Municipalities have historically used restrictive covenants, redlining, zoning ordinances, and residency requirements to keep black residents out. When those tactics fail, white residents with the means simply move out of the municipality. For example, affluent white flight from Ferguson, Missouri was a major cause of its relative poverty.³² This segregation by wealth and often race begins a vicious cycle for towns that have been left behind. They struggle to provide services such as good schools, so property values decline. Lower property values lead to lower property tax revenues, exacerbating the failing services. Without an adequate means to support themselves, such towns are forced to find sources of revenue to provide basic services to their citizens.

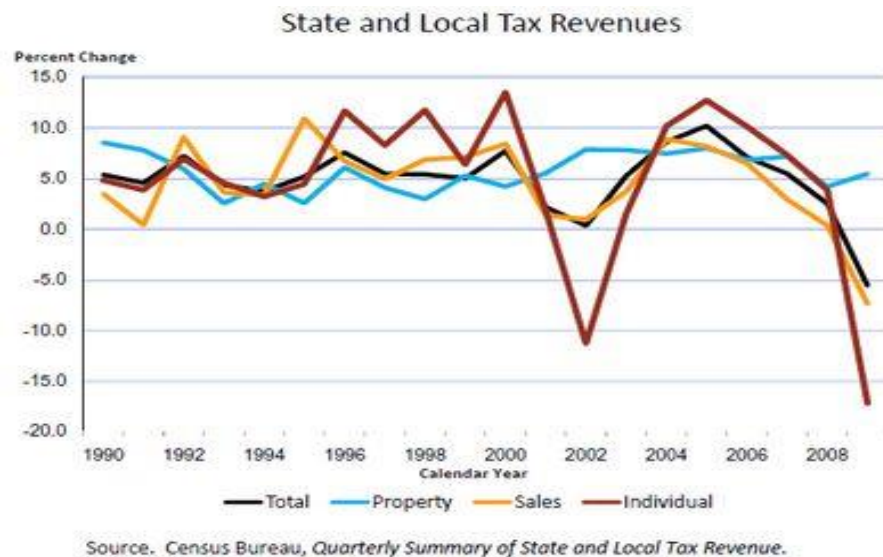
Unfortunately for these towns, revenue from sources other than taxation has also decreased drastically over the past half century. Federal infrastructure funding for municipalities, for example, has declined significantly since 1960,³³ while the cost of upkeep has steadily increased.³⁴ State funding to local governments has also decreased markedly in the recent recession.³⁵

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The financial desperation of poorer municipalities leads them to financialize their court systems and thus extract from the very residents they're meant to serve.

Figure 6: Collapse of State and Local Revenues



Source: U.S. Census Bureau³⁶

The oppressive system of court fees fits with, and gains, acceptance from, the general turn to fee-funded governance.³⁷ Municipalities are increasingly viewing incarceration, and the criminal justice system generally, as "services" for which "users" should pay, just like any other public utility. Fines have constituted a large portion of criminal penalties since at least 1971.³⁸

California initiated one of the first fees for entry into the criminal justice system in 1965.³⁹ By the 1980s, the practice of billing criminal defendants to reimburse taxpayers had caught on more broadly.⁴⁰ Today, forty-eight states charge these types of fees, and criminal justice fees generally have increased in amount and scope.⁴¹

Towns have also increased revenue by using their authority to set criminal fines, which have also proliferated and increased over the past half century. While some of these fines are set by the state,⁴² many, including some of the most excessive, are also set by local municipalities.⁴³ For example, in Ferguson, common occurrences such

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The financial desperation of poorer municipalities leads them to financialize their court systems and thus extract from the very residents they're meant to serve.

One of the most common tactics is to provide a quota, either for the entire police department or individual officers, of tickets or revenue brought in.

as having “Weeds/Tall Grass” on one’s property can result in a \$102 fine.⁴⁴ Municipalities see charging high fines for high volume offenses as one of the few ways that they can make up budget shortfalls given the legal and practical constraints they face.

Towns and cities also use a variety of enforcement tools to ensure that these practices meet specific revenue goals. First, municipalities can charge the highest fines for the most common offenses. For example, Ferguson’s acting prosecutor recommended higher fines for “high volume offenses,” purportedly to target the crimes with the highest non-compliance but more likely to attain more revenue.⁴⁵ Second, municipalities can increase enforcement of a given penalty scheme. One of the most common tactics is to provide a quota, either for the entire police department or individual officers, of tickets or revenue brought in. For example, in Ferguson, the police department increased its officers’ shifts to twelve hours to hit a \$1.5 million revenue target.⁴⁶ Officers that lagged behind in writing tickets were reprimanded.⁴⁷ Why was hitting this revenue target so important? The Ferguson Financial Director, in pleading to the Chief of Police to meet the target, reported that the town was “looking at a substantial sales tax shortfall.”⁴⁸ In many towns police departments become de facto tax collectors.

In summation, many municipalities have turned to the municipal fine based model to make up for decreasing revenue streams in an age of rising costs. In the circumstances, these funding systems can seem superficially highly attractive. Additionally, the general movement towards paying dues for public goods has helped provide ideological legitimacy for these changes. Meanwhile, state governments facing their own budget shortfalls are loathe to increase their aid to municipalities and so instead give the municipalities the authority necessary to implement a system of LFOs. Local municipalities left to make up for massive budget shortfalls turn to a system of extortion of their own citizens. And ultimately the vulnerable and the poor, disproportionately people of color, foot the bill.

NEGLECTING THE COST-BENEFIT ANALYSIS

But is the municipal fine based model even an effective way to raise revenue? State governments seem to think so, given that they have made it difficult for municipalities to use other funding mechanisms. No one has performed an extensive empirical analysis of LFOs as a

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source of revenue, but two factors suggest that they may be inefficient. First, the model relies heavily on low-income individuals, a population that has little money to give. Second, collecting LFOs imposes heavy administrative costs on the state in the form of monitoring individuals on probation, holding hearings, and financing county jails. As a result, LFOs may cost the municipality more than they raise. Unfortunately, many communities have found ways to ensure that LFOs generate substantial revenue and use privatization strategies to minimize the enforcement cost. Although these techniques seemingly allow municipalities to make money from LFOs, there is a dearth of research on whether that is true, and if so, to what extent. What we do know is that LFOs are not costless. By undermining courts' claims to substantive and procedural justice, the municipal fine based model and the trend toward financialization threaten the legitimacy of local governments, which may have long-term implications for law enforcement. In this section, we first consider whether the fiscal benefits of LFOs outweigh the fiscal costs and then examine the associated social costs.

Municipalities have had mixed experiences generating revenue using the municipal fine based model. As mentioned above, this method relies heavily on the poor since many LFOs only attach to people too indigent to pay the initial fees. Funding government services by extracting money from the poor raises obvious ethical problems. It also poses fiscal problems since people in poverty do not have much money to contribute to government coffers. As a result, many states report difficulty in collecting LFOs. One study found that, among the 11 states analyzed, the average amount of uncollected legal debt dues totaled \$178 million.⁴⁹ Another state reported that it only collected 23% of the fines it assigned.⁵⁰

In response to this problem, some local governments have backed away from LFOs. For example, Fairfield County, Ohio initiated a "pay-to-stay" program in 2003, allowing it to collect fees from each incarcerated individual for each day they stayed in jail.⁵¹ From 2008 to 2011, the county only collected 15% of pay-to-stay fees and saw overall prison revenue fall even as the number of incarcerated individuals rose.⁵² The county scrapped its pay-to-stay policy in response. Medina, Ohio faced a similar problem and also abandoned its pay-to-stay policy.⁵³

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Other municipalities have taken the opposite approach and developed aggressive collection regimes. According to the United States Department of Justice Investigation of the Ferguson Police Department, officials in Ferguson Missouri “consistently set maximizing revenue as the priority for Ferguson’s law enforcement activity.”⁵⁴ Other Municipalities in St. Louis County seemed to follow a similar approach, with five towns generating over 50% of their revenue from fines and fees.⁵⁵ Harpersville, Alabama also took an aggressive approach to LFO collection. The town employed a private probation company, J.C.S., to collect its LFO revenue and did nothing while the company illegally threatened individuals on probation with jail time if they failed to pay certain sums.⁵⁶ This practice, among others, was so egregious that County Circuit Judge Hub Harrington shut down the town’s municipal courthouse.⁵⁷ However, before he did, Harpersville relied heavily on the funds J.C.S. culled. The year that Judge Harrington closed the court, Harpersville expected to receive \$300,000 from J.C.S. collections⁵⁸, \$20,000 more than it generated through sales tax the previous year⁵⁹.

Even where the municipal fine based model generates substantial revenue, the fiscal soundness of the policy depends on whether these funds outweigh the costs. The financial burden of LFOs is harder to track than the revenue gains. Indeed, very little data exists on the fiscal or social costs of a system that relies on legal financial obligations.⁶⁰ However, both may be significant.

To begin with the fiscal costs, collecting LFOs imposes administrative costs on municipalities at each stage of the enforcement process. Consider the procedure for assessing LFOs in Leon County, Florida. First, after a judge imposes the fines and court costs, the person convicted of the crime must meet with the court clerk, who explains the repayment procedure.⁶¹ Second, the clerk must monitor the individual and, if the individual misses a payment, schedule a hearing at one of Leon County’s special collection courts, file a late notice, charge the individual a \$10 fee, and request that the individual’s license be suspended.⁶² Third, a judge must preside over a collections hearing.⁶³ Fourth, if the individual fails to appear, the clerk must issue a warrant for the individual’s arrest.⁶⁴ Fifth, police must track down the individual.⁶⁵ Sixth, if the individual cannot pay, the police must lock the individual in jail until they can go before a judge, usually about one night.⁶⁶ Seventh, the individual must attend a “first appearance” hearing to form a new payment plan.⁶⁷ None of these tasks, on their

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own, take up significant amounts of state time. However, when repeated for thousands⁶⁸ of people, the municipal fine based model and the LFO regime become expensive to operate.

No one has quantified the administrative costs of the LFO system but case studies suggest they are substantial. For example, Broward County, Florida, like Leon County, established a special collections court to consolidate LFO collection hearings. However Broward County found that running this court cost it \$700,000 annually and abolished the court after a few years.⁶⁹ This \$700,000 figure indicates some of the overhead and operational costs associated with LFO collection.

When individuals actually serve jail time for failure to pay, the municipalities' costs increase substantially. In Leon County, jailing someone costs \$53.56 per day.⁷⁰ Combining this number with the \$20 cost of obtaining a warrant, the Brennan Center for Justice found that Leon County spent \$62,085 on locking people up for failing to appear at a collection court hearing in 2007-2008 but only received \$80,450 in paid fines from the people it jailed over that period.⁷¹ This suggests that the use of arrests and imprisonment only netted the county \$18,365. Even this is an overestimate, since it does not include the cost of sending police to arrest the individual, the cost of the first appearance hearing, or the cost of several other administrative steps mentioned above.⁷² Leon County may have been losing money by trying to collect money through arrests and imprisonment. In addition, cities maintain low costs when incarceration is involved by cutting conditions in local jails. As described in a recent piece on debtors' prisons in St. Louis: "Residents who have experienced these local jails often complain of grotesque and inhumane conditions: unclean cells; shivering temperatures; lack of soap, toothpaste, or feminine-hygiene products."⁷³

If the costs of enforcing LFOs are so high, then why do municipalities rely on them for revenue? Part of the problem is that costs get lost within municipal bureaucracies. Many local governments rely on multiple agencies to collect legal debt, meaning that the full cost of enforcement does not appear on a single balance sheet.⁷⁴ Moreover, localities often separate the institution that enforces the debt from the institution that receives the payment, once again making direct comparisons of costs and benefits difficult. Furthermore, specific costs are often passed on to those imprisoned.⁷⁵

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Even if municipalities do not know the precise costs of LFO collection, they recognize that the task creates significant administrative burdens, which they have sought to reduce through privatization. States like Florida, Georgia, and Mississippi all either require or encourage municipalities to rely on private probation and collection companies to extract revenue from individuals who fail to pay their debt on time.⁷⁶ Private probation companies are particularly attractive because they do not charge governments for their services.⁷⁷ Instead, the companies obtain all their revenue from the individuals whom they monitor.⁷⁸ Making the most of this deal, municipal governments provide only minor oversight of private probation companies.⁷⁹

Low-income debtors endure the burdens of this lax regulation. For example, in Georgia, some courts do not make indigency assessments, as they are required to by *Bearden v. Georgia*, but instead ask private probation companies to make these determinations.⁸⁰ Relying on a private actor to enforce constitutionally safeguarded due process protections is legally questionable. Granting this privilege to a financially interested party is almost asking for abuse. In a report on private probation practices, Human Rights Watch interviewed several probation officers who stated that they determined a individual on probation's income level based on whether the probationer purchased items like cigarettes or "Air Jordans."⁸¹ By permitting these practices, municipalities have essentially paid for the cost of enforcing LFOs by reducing due process protections that protect the disadvantaged. As a result, LFO financing not only extracts revenue from people in poverty but also sticks those same people with the bill for administering the regime.⁸²

SOCIAL COSTS AND LEGITIMACY

Even if municipalities have shifted the monetary costs of LFOs, the policy carries social costs in the form of reduced legitimacy for local governments. The public attaches legitimacy to legal institutions when they "exercise their authority fairly."⁸³ When members of the public see legal institutions as legitimate, they are more willing to respect court rulings, turn to courts to settle conflicts, refrain from rioting, and adhere to the law in their regular interactions.⁸⁴ According to social science research, the legitimacy of legal institutions plays a larger role in encouraging obedience to the law than any other factor.⁸⁵ Tom Tyler and Justin Sevier have written about the the

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distinction between substantive fairness and procedural fairness and their relationship to perceived legitimacy.⁸⁶ We will apply their analytical framework to financialization of courts, and show how aggressive LFO collection undermines the public's faith that legal institutions meet either standard of fairness.

First, legal institutions that rely on LFOs for funds weaken their claim to substantive justice by violating the proportionality norm that grounds popular conceptions of punishment. According to Tyler and Sevier, substantive justice, in the context of courts, refers to whether the court achieves its goals of seeking truth and issuing just sentences.⁸⁷ Most Americans assess the justice of a sentence based on whether it is proportional—that is, whether the punishment matches the perceived wrongness of the defendant's conduct.⁸⁸ When municipalities use LFOs as revenue generators, they necessarily impose disproportionate punishments, since the purpose of the fee is not to balance the defendant's transgression but to raise funds. If people see courts using LFOs as morally questionable, the courts will lose legitimacy. Of course, in poor communities of color, a history of racialized policing and prosecution has already eroded any sense of trust in the court system.

“You Have to look at this person's circumstances. Just because they have incurred a fine does not mean that they have no other obligations. They have utilities. They have kids.”

Second, LFOs also threaten municipalities' claims to procedural justice. Procedural justice is implicated in the way a court interacts with the parties during the adjudicative process. Parties view a court as upholding this conception of justice if the court 1.) proves that its process for reaching its disposition is fair and 2.) builds respectful relationships with the parties.⁸⁹ LFO collection clashes with the first form of procedural justice. To assess whether a court is using a fair process, parties consider whether the court allows them to participate and offers a neutral forum for resolving the dispute.⁹⁰ LFO hearings do not provide defendants either of these rights. Especially in states that rely heavily on private probation firms, judges keep LFO hearings brief, encourage defendants to bring their concerns to the probation officer, and thereby deny defendants an opportunity to give their perspective. LFO hearings also call into question courts' ability to act as a neutral arbiter since the courts depend on LFOs for their funding and therefore have a financial stake in the sentence.

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fines.**

At the same time, LFO hearings do not prevent courts from fulfilling the relational requirements of procedural justice. Courts achieve this standard of procedural justice when they treat defendants respectfully and prove that they “sincerely care” about the defendant’s welfare.⁹¹ Some judges abide by these norms. For example, Mississippi Judge Laverne Simpson explained to Human Rights Watch how she attempts to consider the defendant’s situation before imposing a heavy fine.⁹² “Putting people on probation is not something I would do hastily,” she said. “You Have to look at this person’s circumstances. Just because they have incurred a fine does not mean that they have no other obligations. They have utilities. They have kids.” Other judges fail to display concern for relational procedural justice. One Leon County, Florida judge told a defendant who claimed inability to pay due to indigence to “jump on the back of a truck” and work as a day laborer to earn enough money to pay the fines.⁹³ A different Florida judge presided over a collections hearing involving a women who lost her job while she was in jail for failure to pay her fines. When the defendant presented this fact to the judge, he responded by asking “Well...and whose fault is that?”⁹⁴ These differences in judicial behavior suggest that a judge can increase her court’s legitimacy by treating defendants respectfully. However, given the way LFOs inherently violate substantive justice and other norms of procedural justice, it is unclear that even compassionate judges can prevent LFOs from costing legal institutions at least some amount of legitimacy.

In sum, the municipal fine based model and their LFO systems likely allow municipalities to raise some quantity of revenue and, if states permit local governments to rely on private probation firms, impose limited fiscal costs on the municipalities themselves. However, municipalities that frequently jail people for failing to pay fines may see their profit margins reduced. Moreover, regardless of whether states profit off of LFO regimes, these policies sew distrust within the affected communities. This legitimacy reduction has the potential to create tension between police and the public and reduce compliance with the law.

COST OF MASS INCARCERATION

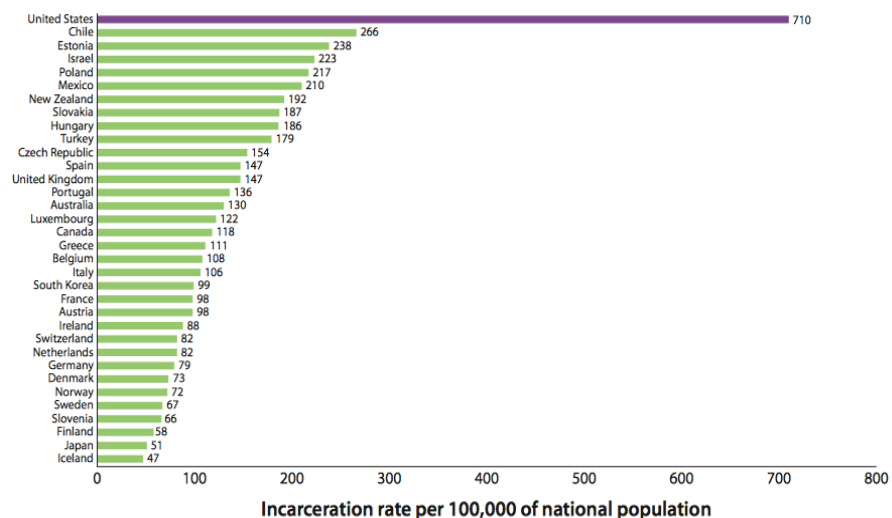
One of the heaviest fiscal burdens motivating the adoption of the municipal fine based model is mass incarceration, the exponential increase in the imprisonment of Americans that has made the United

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States the the world's most carceral state. In 2009, the United States incarcerated nearly a quarter of the world's prisoners.⁹⁵ As of 2012, the United States incarcerated more of its population per capita than any other country that reported such statistics.⁹⁶ Compared to Western Europe, a United States citizen is seven times more likely to be incarcerated.⁹⁷ Black Americans have borne the brunt of mass incarceration, facing an incarceration rate six times higher than the average citizen of the United States, itself the country with the world's highest incarceration rate.⁹⁸ This means the United States incarcerates a higher percentage of its black population than South Africa did at the height of apartheid.⁹⁹

Figure 7: US incarceration rate compared to other countries



Source: Hamilton Commission¹⁰⁰

A key pivot point in the history of mass incarceration was the initiation of the "War on Drugs." In June of 1971, President Nixon gave a speech proclaiming drugs "America's public enemy number one" and declaring a "new, all-out offensive" against them.¹⁰¹ While the 1970's saw a modest increase in incarceration, the "War on Drugs" ramped up significantly at the dawn of Ronald Reagan's presidency. In 1982, Reagan officially declared his own version of the "War on Drugs."¹⁰² By 1986, several watershed changes had occurred in drug enforcement. Funding for antidrug enforcement programs

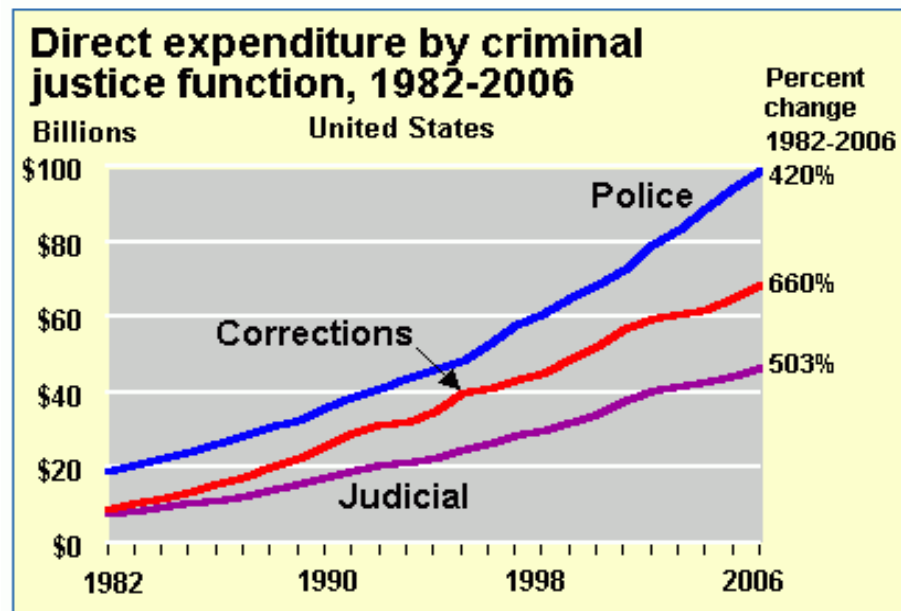
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skyrocketed while funding for treatment programs rapidly decreased.¹⁰³ Drug arrest rates doubled over the course of the 1980s.¹⁰⁴ This period also saw Congress and many states pass increases in mandatory sentences for drug offenses. For example, the Anti-Drug Abuse Act of 1986 established a series of punitive penalties for drug offenders ranging from five years to life imprisonment.¹⁰⁵ At the same time, a bipartisan movement in favor of legislation that was tougher on crime emerged and also led to increasingly punitive sentences for non-drug offenses. The result of this movement was the age of mass incarceration. The toll that the carceral state has wrought upon poor and minority communities has been horrific.

More broadly, mass incarceration has also exacted a correspondingly high fiscal toll on states and municipalities. While estimates vary as to the cost of mass incarceration, the United States spent over \$80 billion on corrections expenditures in 2010.¹⁰⁶ The corresponding costs of police enforcement and judicial process have also increased dramatically.

Figure 8: The costs of mass incarceration



Source: United State Bureau of Justice Statistics¹⁰⁷

States and municipalities have been hit hardest by this increase in costs. Overall, corrections expenditures today have more than quadrupled since 1980.¹⁰⁸ States and local municipalities have faced

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tremendous pressure to somehow offset the titanic costs of mass incarceration. With increasing costs all around, local courts, in particular, face pressure to become self-sufficient.¹⁰⁹ In many cases, the budget provided for these courts is directly attached to the revenue accrued from fines. Hence, many municipal courts have a direct pecuniary interest in increasing revenue from fees. As discussed above, this strategy to pay for mass incarceration is ultimately self-defeating. By incarcerating people for failure to pay fines, municipalities and states ultimately increase the overall costs of mass incarceration. Additionally, many of the people targeted can never pay the fines because of their poverty. Leveraging the municipal fine based model to finance mass incarceration is in actuality a self-defeating strategy.¹¹⁰

UNDERLYING LEGAL DOCTRINE

Most of the law that leads to the system of financialized courts is relatively common doctrine run amok. The massive volume and extent of fines levied upon “offenders” is one example of this. The only clear limitation on the extent of fines given to an individual is nominally the Eighth Amendment, which forbids “excessive fines.” In *United States v. Bajakajian*, the Supreme Court held that depriving a traveler of all the money he had failed to declare when leaving the United States (over \$300,000) violated the Amendment.¹¹¹ Justice Thomas, writing for the Court, explained that a “punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”¹¹² This standard surely applies to some of the fines being levied on poor individuals in places like Ferguson. However, the Supreme Court has yet to show any inclination to expand this standard to other fee schemes.

The most constitutionally controversial aspect of these schemes is the practice of jailing individuals for being unable to pay fines. The United States has twice attempted to outlaw imprisoning people for inability to pay their debts. The federal government outlawed debtors’ prisons in the early 1800s and most states later followed suit.¹¹³ Nonetheless, states continued to imprison people because they could not pay fines, often by revoking their probation if they could not make regular payments. In 1983, the Supreme Court addressed this practice in *Bearden v. Georgia*, holding, based on a combination of the Due

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Process and Equal Protection Clauses, that a defendant could not be incarcerated for failure to pay a fine she could not afford.¹¹⁴ The *Bearden* Court also specified that a lower court was obligated to inquire into whether a defendant had made “sufficient bona fide efforts to pay” before incarcerating them.¹¹⁵ However, the Court did not specify what procedures were necessary to determine a defendant’s indigency. The lack of clarity in what constituted willful failure to pay and the vagueness of the court’s opinion allowed the practice of incarcerating people for failure to pay debts they could not afford to survive.

The first reason that courts are able to skirt *Bearden*’s prohibition is that the opinion itself was neither entirely clear nor comprehensive. For example, many courts have held that *Bearden* does not apply to instances in which a defendant has agreed to pay restitution during their probation as part of a plea bargain.¹¹⁶ In *Dickey v. State*, the Georgia Court of Appeals decided that *Bearden* did not apply on the grounds that a defendant, by willfully entering into a plea bargain with requirements to pay restitution, puts themselves in a situation where any failure to pay constitutes a willful violation of the bargain.¹¹⁷ Since the vast majority of criminal cases result in plea bargains, this significantly undermined the applicability of *Bearden*’s holding. The court in *Bearden* wrote in an additional limitation on the case’s application. Justice O’Connor, writing for the Court, held that a state could incarcerate a defendant if the defendant willfully failed to pay a fine or if it “determine[d] that alternate punishment is not adequate to meet the State’s interests in punishment and deterrence.”¹¹⁸ The Northern District of Alabama, in the case of *United States v. Johnson*, justified revoking a defendant’s probation on, amongst other grounds, the claim that there were no other punishments available that could adequately serve the state’s interests.¹¹⁹

The main problem with *Bearden*, however, is its failure to institute a clear line distinguishing when people can and cannot be incarcerated for failure to pay fines. The landmark case of *Gideon v. Wainwright* lays out a set of procedures that must be followed to determine whether an indigent defendant must be provided with a state-funded attorney. However, even though similar risks of incarceration apply to LFOs, lower courts have not applied anything like the same standards to these indigency determinations. Many municipal courts have only scantily inquired into a defendant’s ability to pay before revoking their probation or have simply failed to conduct any *Bearden* analysis into

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Despite its vagueness, *Bearden* clearly obligates courts to engage in at least some sort of analysis before putting a person in prison for failure to pay fines, but this requirement has been largely ignored in many jurisdictions.

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Many municipal courts simply operate in ignorance, sometimes willful, of their constitutional obligations under *Bearden*. In Ferguson, for example, the local municipal court actively ignored arguments that its practices were constitutionally deficient and threatened attorneys who pressed the matter with jail time for contempt of court.¹²⁰ Other courts may simply be unaware of what the law is or what their obligations are. That appears to have happened in a municipal court in Harpersville, Alabama, in which countless people were unconstitutionally jailed before the court was reprimanded.¹²¹ It seems that *Bearden* has been so ineffective both because it is both difficult to discern and because it is relatively easy to ignore.

Ultimately, the clearest way in which the municipal fine based model and its burdensome system of LFOs are unconstitutional is the way in which it is implemented rather than the doctrine itself. The racist, vague, and selective enforcement of these laws, seen in Ferguson and elsewhere, is what render these laws clear violations of the Constitution. It is the lacunae in the doctrine, however, that allow municipalities to engage in these practices in the first place.

SOCIAL NORMS AND ATTRIBUTIONAL STYLES

Lurking behind many of the causes and contextual factors discussed above are the psychological forces that support a dependency on the municipal fine based model. As constructivist sociologists have argued for decades, people will not necessarily support a policy that furthers their rational self-interest unless they also view it as normatively legitimate.¹²² Policies gain normative legitimacy when they are compatible with popular ideologies: frameworks that establish the ends people believe society should pursue and the means they believe society should use to achieve those ends.¹²³ As broad normative frameworks, ideologies often cannot prescribe policy courses until they are combined with factual assumptions about the way humans behave.¹²⁴ Attributional theories offer such assumptions about human conduct and, as a result, the legitimacy of a policy often depends on whether it is endorsed by a popular ideology combined with a particular attributional schema.

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When the municipal fine based model was introduced, two dominant criminal justice ideologies were a retributivist theory of punishment and a “broken windows” approach to policing. On their face, neither of these ideologies legitimizes or proscribes a system dependent upon LFOs. However a series of social and political factors combined to create an environment in which people viewed dispositionism as the appropriate framework through which to view criminal justice policy. Interpreted through a dispositionalist lens, retribution and broken windows theory provided a normative foundation capable of justifying aggressive LFO policies.

To explore this progression, we begin by explaining the difference between dispositionist and situationist attributional styles. Then, we apply those concepts to explain how the municipal fine based model became socially legitimate. Finally, we explain how the psychological and economic factors that led politicians to endorse LFO regimes also caused judges to fail in their duties to protect indigent defendants from legal debt abuse.

Attributional Styles: Dispositionism versus Situationism

People generally rely on one of two frameworks when making attributions. Dispositionism attributes an individual’s actions to her conscious and deliberate choices.¹²⁵ This approach assumes that individuals possess stable preferences that form their identity.¹²⁶ When people act, they think about the relevant information, assess the facts against their preferences, and will themselves to act in the way most compatible with their preferences.¹²⁷ Mind science research reveals that this model of human behavior is inaccurate: people lack stable preferences, frequently make decisions without reflection, and act in accordance with social pressures rather than solely in response to their will.¹²⁸ Situationism, by contrast, presumes that environmental factors rather than individual choices primarily explain human action.¹²⁹ This approach accepts the conclusions of the mind sciences and roots itself in a theory of human behavior that recognizes the power of external forces and the limits of human cognition.

Situational factors not only predict how humans act but also how they attribute. Popular theories of attribution suggest that we blame an individual for harm based on the extent to which we believe the individual willed the harm, caused the harm, and volitionally performed the predicate act.¹³⁰ This “common sense” approach

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**People have a
system
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to “defend, justify,
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overlooks the fact that people can only reach conclusions about will, cause, and volition by first interpreting their observations of an event.¹³¹ As our brains attempt to make sense of this external information, powerful psychological motives subconsciously bias our cognition process.

Two of these motives are highly relevant here. First, people have subconscious group-biases that encourage their brains to interpret data in ways that affirm members of their in-group.¹³² At the same time, individuals also have subconscious prejudices against out-groups that lead them to process information in ways unfavorable to out-group members.¹³³ As a result, people tend to commit what psychologists call the “fundamental attribution error” of using disposition to explain the bad things that happen to members of out-groups and situation to explain good things that happens to members out-groups, but relying on situation to justify the bad things that happen to members of in-groups and disposition to explain the good things that happen to members of in-groups.¹³⁴ Second, people have a system justification motive to “defend, justify, and bolster the social status quo.”¹³⁵ As a result, when the system is threatened we tend to attribute bad outcomes to bad people rather than a bad world.¹³⁶ Taken together, these motives show that an individual’s attributional style often depends on situational factors. The circumstances surrounding an act, the group-identity of the person being blamed, and our recent experiences with system threat all shape whether we attach responsibility to a person’s disposition or situation.

Criminal Justice Ideology

Over the past three decades, theories of punishment such as retribution and broken windows approaches to policing quickly transitioned from academic theories into frameworks that shaped public policy and discourse.¹³⁷ Although the popular versions of these ideologies ultimately endorsed dispositionist theories of attribution, the internal logic of each theory would have been perfectly compatible with a situationist approach. However, environmental factors encouraged people to rely on dispositionist attributional styles when reflecting on criminal justice policy. The result was a punitive criminology that could justify aggressive systems of LFO imposition and collection.

Although commonly associated with retaliation, retribution represents a distinct philosophical framework that dates back (at least) to the writings of Immanuel Kant. Core to any version of this theory is the principle that people who autonomously choose to cause harm deserve to suffer some proportional amount of hardship in return.¹³⁸ By tying punishment to freely willed decisions, retribution may seem like a highly dispositional theory. However, retribution merely states that, under the condition that someone freely chooses to do evil, she should be punished. Consequently, a situationist could support retribution and argue that the latter condition is rarely met and so people should be punished only infrequently. As implemented in the United States, retribution has not taken that turn. Starting in the 1970s, retribution gained prominence as a theory of punishment that could replace what many saw as a failed rehabilitative model.¹³⁹ As discussed above, during the same time period the number of people in prison skyrocketed ¹⁴⁰, suggesting that policy-makers combined retribution's justification for punishment with a dispositionist attributional style.

Like retribution, broken windows theory can accommodate either attributional schema but, as implemented, has been tied to dispositionism. Developed by sociologists George Kelling and James Q. Wilson, broken windows theory starts from the premise that instances of social disorder, such as broken windows in a building, lead to breakdowns of the social norms that are necessary to prevent violent crime.¹⁴¹ This observation recognizes that external forces can make crime more likely and, as a result, could have led to a situationist theory of crime reduction. If Kelling and Wilson concluded that governments should invest in local communities to help them repair sources of disorder, then broken windows theory would fit comfortably within the situationist canon. Instead, Kelling and Wilson took a dispositionist turn, arguing that police could only prevent communal decay by arresting “undesirable persons” such as panhandlers.¹⁴² Adopting this policy, municipalities throughout the country implemented zero tolerance policing and authorized officers to arrest people for minor crimes.

By tying these frameworks to dispositionist attribution styles, policymakers inadvertently created a normative foundation that justified the municipal fine based model. The popular versions of retribution and broken windows theory establish a presumption that people who break the law do so deliberately and deserve punishment.

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Broken windows theory in particular stresses that even actors who commit minor crimes, such as failing to pay legal debt, threaten the larger social order and therefore must be reprimanded. These principles make imprisoning someone for failure to pay legal debt seem just. After all, the debtor made a choice to deprive the state of funds and break its norms of order. Applying this dispositionist frame, individuals who make such decisions prioritize themselves over the community and deserve punishment.

Popular understandings of retribution and broken windows theory also combine to create a rationale for imposing hefty fees on minor offenders. Although retribution requires that punishments be proportional to the harm suffered by the victim and the community, defenders of the theory frequently struggle to provide a way to assess communal harm. The popular version of broken windows theory resolves this problem by encouraging policymakers to adopt broad measurements of communal harm. Since the theory posits that a minor offense can lead to disorder which spurs more crime, an individual committing a misdemeanor offense should be held responsible for far more hardship than the immediate consequences of his action. Municipal fine based models fit within this broad conception of communal harm. If an offender goes to court or jail, she harms the community by forcing it to pay for her use of public facilities. Municipal fine based models are based on the principle that the offender's punishment should force her to internalize this cost.

By contrast, versions of retribution and broken windows theory based on situationist attributions are incompatible with aggressive LFO collection schemes. For example, a situationist retribution theory would recognize that when low-income people default on their debt, they generally do not choose to withhold money from the state but simply do not have the money to pay the debt. Since the defendant's default did not represent an autonomous act of her will, a situationist theory of retribution would find punishing the debtor with additional fees or jail time immoral. Similarly, a situationist broken windows theory would not treat legal debtors as the cause of urban decay. Instead, it would recognize that the same social forces that lead to "broken windows" and urban crime also mean people lack sufficient resources to pay small debts. Since squeezing money from the poor would not address these structural forces and would instead worsen them, a situationist broken windows theory would not endorse imposing heavy LFOs on the poor. This thought experiment suggests

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that retribution and broken windows theory can start with the same core principles but reach radically different conclusions about the offender-funded model based on attributional style. As a result, it suggests that attributional schemas, and not these particular ideologies, represent the prime mover of public policy decisions.

The effect attributions have on policy perspectives means that changing the LFO system requires us to understand why dispositionist accounts of retribution and broken window theory defeated situational accounts. In part, the answer to this question is inherent in the nature of the attributional styles. People want to make attributions quickly without expending significant cognitive effort.¹⁴³ Dispositionism serves this need since it provides simple answers and does not require people to spend time reflecting on a complex set of facts before reaching a conclusion.¹⁴⁴ Situationist approaches to attribution require precisely the opposite: they offer complex answers that people can only reach after extensive reflection.¹⁴⁵ As a result, dispositionism is often our default way of making attributions, which we only overcome if we work to change our attribution style or when external factors encourage us to look more broadly at a problem.¹⁴⁶

System Justification Theory and Racial Group Bias

Unfortunately, retribution and broken window theory came to prominence during an era when, far from encouraging people to look at criminal justice policy from a situational perspective, environmental factors reinforced people's existing bias towards dispositionist attribution styles. During the late 1970s and into the 1980s, crime soared throughout America, creating fear and anxiety among the public.¹⁴⁷ System justification theory—which posits that people are motivated to support and rationalize the status quo—predicts that when interpreting this rise in crime as a threat to the social order, people will have a subconscious drive to view criminal justice policy in a way that affirms existing social structures.¹⁴⁸ A dispositionist approach to criminal justice policy achieves that goal by blaming offenders for the problem rather than engaging the uncomfortable possibility that the dominant social order is neither just nor secure and is partly to blame for the violence. People affected by dispositionist bias interpret facts about crime in a dispositionist light and thus see dispositionist versions of retribution and broken windows theory as more consistent with their subjective understanding of crime than situationist versions of these theories.

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The criminal justice dialogue of the 1980s also implicated race, making group biases salient. Americans have always viewed crime through a racialized prism¹⁴⁹ and the tenor of the debates on criminal justice in the 1980s and 1990s gave this prism strong prominence. As a result, Americans across the racial spectrum may have thought about criminal justice policy with a black offender in mind.¹⁵⁰ For all racial groups other than black Americans, this perception would have triggered out-group biases, motivating them to use dispositional frameworks when assessing criminal conduct.¹⁵¹ As a result, the racial dynamics of criminal justice policy would have reinforced system justification motives to use a dispositionalist attributional style to explain criminal conduct. For blacks, the racial overtones of the criminal justice debate would have created a conflict between in-group biases supporting a situationist schema and system justification biases driving a dispositionalist approach to crime.¹⁵² According to Professor John Jost, system justification biases tend to win such conflicts as disenfranchised groups subconsciously wrap their powerlessness into the existing social order that they are psychologically motivated to preserve.¹⁵³ Thus, racial dynamics likely furthered the public's support for dispositionalist criminological theories.

The rise of dispositionism in criminal justice policy does not merely reflect an organic confluence of external factors but also the concerted effort of powerful actors to inject race into the dialogue. As Professors Adam Benforado and Jon Hanson have argued, people with influence often act as "attributional entrepreneurs," encouraging the public to adopt an attributional schema that suits the entrepreneurs' interests.¹⁵⁴ In the context of criminal justice policy, politicians infused race into debates on crime to advance their own personal ambitions.

As noted above in the discussion of mass incarceration, crime has long been a site of explicit and implicit racist appeals. For decades after reconstruction, Southern white Americans used the narrative of the "black brute" to paint black Americans as dangerous and to justify repressive measures to control them.¹⁵⁵ President Nixon and his successors invoked this narrative by linking crime to race in subtle ways that did not appear overly prejudiced—a tactic known more broadly today as "dog whistling." Perhaps the most brazen example of this tactic was George H.W. Bush's 1988 Willie Horton ad, which used the story of a black American inmate who committed a rape after

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failing to return from weekend furlough from a life sentence, to tie blackness to crime without making the connection explicit.¹⁵⁶ Strategies like this one allowed candidates to appeal to voters' subconscious racial biases while avoiding the overt forms of prejudice inconsistent with many voters' conscious, pro-social preferences for tolerance.

The consequence of these campaigns has been a further comingling of race and criminality in the minds of the American public. Public officials have a unique capacity to shape popular opinion. Most people do not construct policy opinions by gathering data and performing independent analyses but rather rely on heuristics.¹⁵⁷ According to recent literature on issue framing, "a key mental shortcut is to take cues from trusted political elites."¹⁵⁸ When politicians use this influence to link blackness with criminality, they encourage voters to imagine criminals as black. In this context, out-group biases become salient, motivating people to adopt a dispositionist perspective on criminal justice policy. As a result, tough on crime politics not only explicitly encourages harsh forms of broken windows theory and retributive justice but also creates an attributional environment in which voters adopt a dispositionist mentality that legitimates such policies.

The Failure of Judicial Protection

The legal, economic, and psychological factors discussed above partly explain why state and local legislatures adopted the municipal fine based model, but do not excuse that decision. The oppressive system of LFOs exploits the poor and, at times violates their legal rights. In our system of divided government, this would be a place for the judiciary to intervene, check the legislature, and protect the rights of marginalized groups. Sometimes, courts have done just that.¹⁵⁹ However more frequently, judges have been complicit in the abuse, failing to enforce defendants' basic procedural rights or pressuring them to adhere to unfair demands. Why, in the context of LFOs, do judges fail in their role?

The most benign explanation for judges' conduct is that they make good faith efforts to interpret the law but subconscious biases lead them to overly harsh readings. For example, the Ohio Constitution, like the United States Constitution, bars courts from imprisoning people solely because they cannot pay their fines.¹⁶⁰ Yet in 2010, a

Dayton court kept a list of over 5,000 warrants for the arrest of people who had unpaid legal debt.¹⁶¹ When a local advocate determined that 93% of these warrants were illegal, the judges refused to budge because “of the ingrained belief that debtors’ prisons were constitutional.”¹⁶² The social forces that allowed the offender-funded model to gain prominence may also lead judges to adopt this reading of the constitution. Like politicians and the general public, judges live in an era in which dispositionist versions of retribution and broken windows theory are popular normative theories to justify criminological practices. Judges influenced by these approaches may view procedural protections as barriers to just sentences and therefore narrowly construe rules requiring indigence tests or barring imprisonment for failure to pay legal debts.¹⁶³

Implicit biases and subconscious motives may also encourage judges to distrust defendants who say they are too poor to pay. Research by Professors Kristin Lane, Jerry Kang, and Mahzarin Banaji confirms that people not only have explicit, conscious attitudes toward objects and groups but also implicit unconscious ones.¹⁶⁴ Since we do not detect our unconscious biases, it is difficult to prevent stereotypes or group biases from influencing our opinion formation. The research indicates that people across races tend to have strongly negative implicit associations toward racial minorities and favorable ones toward white Americans.¹⁶⁵ This disparity can influence behavior, particularly in circumstances where we feel we must make a fast decision.¹⁶⁶ Judges, who often face backlogged dockets, may feel pressured to make a quick decision regarding a defendant’s capacity to pay her fines. The pressure for speed may lead judges to allow their implicit attitudes to play an outsized role in their assessment. This tendency would encourage judges to distrust testimony by black or poor defendants about their income level.

In addition to good faith mistakes, some courts seem to deliberately ignore procedural protections. For example, Ohio law requires that offenders receive a \$50 credit toward their fines for every day they stay in jail, yet the Hamilton County Court’s website misleadingly states that offenders only receive a \$30 credit per day spent in jail.¹⁶⁷ More egregiously, Judge James DeWeese, a county court of common pleas judge, once violated state law by imprisoning an offender solely for her failure to pay a fine but offered her a judicial release if she agreed to drop her appeal of his decision and prevent him from facing oversight.¹⁶⁸ Economic incentives also provide a possible motivation

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for judges to commit these flagrant violations of their duties. Courts depend on fines and fees to pay their operating costs.¹⁶⁹ In Florida, for example, LFOs represent courts' only source of revenue.¹⁷⁰ These budgetary rules intertwine sentencing decisions and funding decisions, creating clear conflicts of interest for judges, potentially leading to abuses.

This discussion of judicial conduct reveals that courts' failure to protect defendants from abusive laws stems from the same factors that cause those laws to come into existence in the first place. In both cases, implicit racial biases, dispositionist attributional schemas, and perverse incentives combine to create an environment in which extracting resources from the poor seems both financially necessary and just. That the same factors can lead to similar problems across different branches of government illustrates the systemic relationship between the causes discussed here and the resulting social injustice. Addressing the influence of these psychological forces requires a reexamining of many of the principles that underlie the current social structure. That task exceeds our scope. However the next section discusses ways we might challenge the offender-funded model and perhaps begin to chip away at the perverse norms that allow this practice to exist.

SOLUTIONS

In jurisdictions across the country, activists, lawyers, policy-makers and judges are working on behalf of individuals like Vera Cheeks, Harriet Cleveland and Thomas Barrett, as well as the communities to which they belong, seeking to bring an end to the injustices wrought by private probation companies and the municipal fine based model. Whether raising awareness, filing lawsuits, or lobbying for reform, they have made impressive strides, and their work informs the systemic approach we outline in the case study below. This section describes the tools employed, highlighting both their strengths and their limitations.

MOTION PRACTICE

A first line of defense in reducing the problem of financialized courts would be for more lawyers to represent indigent individuals in municipal courts. Attorneys can play an important role by simply filing motions to dismiss traffic fines and warrants based on indigency. Lisa Borden, a Pro Bono Shareholder at Baker Donelson in Birmingham, Alabama, regularly uses a set of motions to remit fines and recall warrants. (See Appendix A).

In Alabama, individuals are often jailed for failure to pay. However, in her motions, Ms. Borden cites to a number of Supreme Court decisions that greatly limit the use of incarceration for failure to pay. For example, *Bearden v. Georgia* held that a court cannot revoke probation for failure to pay fines or make restitution without first conducting an evidentiary hearing and establishing that the person is responsible for the failure to pay.¹⁷¹ In essence, *Bearden* requires a demonstration of a refusal to pay rather than an inability to pay. Further, the 1971 Supreme Court case of *Tate v. Short* held that imprisonment solely based on an inability to pay fines for offenses, such as traffic offenses, which are normally punishable only by fines, violates the Fourteenth Amendment.¹⁷² Finally, the Supreme Court declared in *Alabama v. Shelton* that a defendant must have had legal representation in the original trial if they are to be incarcerated for a violation of misdemeanor probation.¹⁷³

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Although Ms. Borden has had great success with these motions in Alabama, this approach would require vast numbers of attorneys. Moreover, even if there were enough attorneys to accompany every indigent defendant to traffic court, it is unclear how courts would respond to court fees and fines being challenged en masse. Ms. Borden hypothesizes that courts would either resist these efforts in fear that revenue would evaporate, or grow wary at the prospect of prolonged litigation and terminate their contracts with private probation companies.¹⁷⁴ The latter outcome would be an added benefit of increased motion practice.

LITIGATION

Litigation is a blunt tool best used in combination with other strategies to attack the municipal fine based model. There are many ways in which the system of LFOs is vulnerable to legal attack. However, it is difficult to reach the systemic causes identified above with litigation. More often, lawsuits are effective in garnering relief for individual defendants or, in rare cases, entire townships. Systemic reform through a federal circuit or state supreme court decision is possible, but has not yet proven successful. Many lawsuits at smaller scales have been successful more for garnering attention than for garnering relief for plaintiffs and towns. There are many ways in which one can attack the municipal fine based model that keeps the poor in a cycle of debt and incarceration.¹⁷⁵ Below are three successful lawsuits that demonstrate the ways in which litigators have gone after these systems.

One way to attack the system of for-profit justice is to target private probation companies. While private probation companies do not make the policy that leads to excessive fines and jail time, they aggravate an already distorted criminal justice system by adding another layer of profit motive. Additionally, unlike local municipalities (at least in theory), they have little interest in the potential externalities of abuses. Their only interest is in profiting from probation supervision fees. A group of probationers in Georgia challenged a private probation company, Sentinel Defender, in the Georgia Supreme Court in the case of *Sentinel Defender SCVS, LLC v. Glover*.¹⁷⁶ They levied several claims against Sentinel, ranging from breach of contract to objections to specific practices. In particular, the plaintiffs alleged that private probation was unconstitutional under the Georgia Constitution.

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The plaintiffs lost on most of their claims and the court decided that private probation was constitutional. They won, however, on their claim that the practice of tolling—extending sentences beyond statutory limits by suspending them when a probationer did not meet every supervisory requirement—was prohibited by statute.¹⁷⁷ This is a valuable victory for offenders subject to private probation. Previously, private probation companies would routinely extend sentences in perpetuity when offenders did not meet probationary requirements, increasing supervisory fees for themselves and lengthening the misery of their probationers. The plaintiffs also won the contract claim against Sentinel, winning damages against the company for acting without a proper contract.¹⁷⁸

While the plaintiffs won and lost in their claims against Sentinel, their greatest victory may have been the publicity that the case generated. The Georgia Legislature recently passed a bill providing greater regulation of private probation companies.¹⁷⁹ This case represents the ideal scenario for activist litigation—spurring popular calls for reform that do not rely on the courts themselves. When the abuses of private probation companies make it into the headlines, it is generally a victory for those challenging their practices. The *Sentinel* case is a good example of a small group of plaintiffs making marginal gains in the courthouse and far greater gains in the court of public opinion.

As noted briefly above, another group of plaintiffs in Harpersville, Alabama, attacked the practices of the local municipal court and the private probation company that worked with it. The plaintiffs alleged, amongst other unlawful practices, that they were incarcerated for an inability to pay off their fines in violation of the Fourteenth Amendment.¹⁸⁰ The judge who presided over their case was so appalled by the practices of the lower court that he took over the Harpersville Municipal Court to provide relief to the offenders on probation in that county.¹⁸¹ Here, the victory for petitioners was broader than the *Sentinel* case, at least for those probationers in Harpersville County. While the suit did not end private probation in the county, it sent a clear message to the local court that its municipal fine based model was illegal. A case like this also sent a message to surrounding counties that they could face similar liability for their own flawed systems. Finally, the public dressing down of the municipal court for what Alabama Circuit Court Judge Hub Harrington labeled “a judicially sanctioned extortion racket” made national news.¹⁸² In doing

so, it helped once again shine light on the abuses perpetrated by municipal courts and private probation companies.

Our final example of successful litigation is the lawsuit filed on behalf of Harriet Cleveland, which was successful on several fronts¹⁸³ The plaintiffs won compensation for the harms inflicted upon them and attained guidelines to help prevent the same harms from being visited upon the citizens of Montgomery in the future. Furthermore, the settlement made national news (Harriet Cleveland's case was even featured on John Oliver's HBO show, *Last Week Tonight*) and significantly increased awareness regarding the problems of financialized courts. As one of the attorneys for the plaintiffs, Alec Karakatsanis, co-founder of Equal Justice Under Law, stated in an interview with National Public Radio, the settlement in Montgomery "has a chance to be a really groundbreaking moment in the fight against the rise of modern debtors' prisons."¹⁸⁴ This is the core role of litigation in reforming the municipal fine based model and its oppressive system of LFOs—breaking ground on a solution so that other strategies can later achieve the ultimate goal of systemic reform.

LEGISLATION

One of the most promising means of addressing the issue of the municipal fine based model is the passage of legislation that directly confronts the systemic roots of the problem. A few states have already passed or are in the process of passing legislation dealing with the most egregious aspects of the offender-funded model: its dependence on private probation companies.

In Colorado, H.B. 14-1061 passed the Colorado House by a vote of 64-0 and the Colorado Senate by a vote of 34-1¹⁸⁵. Governor John W. Hickenlooper signed the bill into law on May 9, 2014.¹⁸⁶ The bill requires Colorado courts "to conduct on-the-record indigency hearings before incarcerating debtors for failing to pay debts owed to the state."¹⁸⁷ The bill expands the purview of the law, which already explicitly protected those who owed fines from incarceration due to non-willful failure to pay, by bringing court costs and fees under the umbrella of protection.¹⁸⁸ The bill also requires courts to make indigency determinations prior to incarceration and directs courts to provide notice and make "findings on the record" that the defendant can pay "without undue hardship to the defendant or the defendant's

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dependents” and that “the defendant has not made a good faith effort to comply with the order.”¹⁸⁹ If an individual is deemed unable to pay the fine, courts may recommend community service or a payment plan.¹⁹⁰

The legislation was a direct response to a damning report by the American Civil Liberties Union (ACLU) of Colorado that found that Colorado courts were incarcerating people for failure to pay court fines.¹⁹¹ The report was followed by an explosive piece in the Denver Post that detailed stories of individuals jailed for not being able to pay fines for minor offenses.¹⁹² The article quoted Mark Silverstein, legal director of the ACLU of Colorado, as saying, “jailing Colorado residents because they are too poor to pay their fines is a bad idea for multiple reasons. It doesn’t get the fine paid. It wastes resources. It worsens poverty. It unfairly creates a two-tiered justice system.”¹⁹³ The article then detailed how the practice conflicts with U.S. and Colorado constitutional bans on “debtors’ prisons.” The article concluded by describing a draft proposal from a Colorado Supreme Court committee summoned at the urging of the ACLU.¹⁹⁴ The final bill closely mirrored that proposal.

The ACLU also stressed the fiscal benefits of passing the bill. Denise Mays, public policy director of the ACLU of Colorado, stated, “There is also a vast bipartisan agreement among legislators that jailing the poor for unpaid fines is fiscally unwise. Throwing a person in jail because they owe a debt to the court not only means that the court will never collect that debt, it also costs the taxpayer significant money to arrest and imprison a person who does not deserve to be there.”¹⁹⁵

Although the bill suffers from an unclear definition of “undue hardship,” it has nevertheless provided Colorado courts with much-needed guidelines and guidance on ending the state’s practice of debtors’ prisons. Its passage also demonstrates how aiming the media spotlight on abuses—as ACLU report accomplished—can spur positive legislation.

In Illinois, a somewhat similar bill, dubbed the “Debtors’ Rights Act” was passed and signed into law by Governor Pat Quinn in 2012.¹⁹⁶ This bill was designed to “protect poor people from being jailed over unpaid debts.”¹⁹⁷ However, the bill resulted from a frustration with creditors “abusing the court system to put debtors in jail to collect on

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a debt they are clearly unable to pay” rather than with an investigation of internal court practices.¹⁹⁸ Nevertheless, the legislation serves as a model in its requirement that courts make a “finding of a consumer’s ability to pay before entering a payment order.”¹⁹⁹

Governor Nathan Deal recently signed HB 310 into law. The bill comes on the heels of Governor Deal vetoing HB 837, which would have “allow[ed] electronic monitoring for misdemeanors; permit[t]ed tolling probation periods so probation fees can be paid in their entirety; and establish[ed] privacy protections for the companies’ financial information.”²⁰⁰ Governor Deal cited “the lack of transparency if the companies are exempt from the Georgia Open Records Act” in his veto of the bill.²⁰¹ It is worth noting that Governor Deal’s April 2014 veto of the bill came only two months after the release of a Human Rights Watch report that detailed “widespread abuses linked to the private probation industry in Georgia and in other states, many of them fueled by a profound lack of adequate state government oversight and regulation.”²⁰²

After the veto, Governor Deal asked the Criminal Justice Reform Council he had convened in 2011 to investigate the state’s for-profit probation industry. In the Council’s final report, Co-Chairman Judge Michael Boggs is quoted as saying, “the moral imperative is clear. The inequities and abuses that were pointed out in the audit and through anecdotal stories deserve immediate attention.”²⁰³ The report then details a number of recommendations to strengthen protections for indigent defendants and to increase the transparency of private probation company practices. Many of these recommendations were included in HB 310²⁰⁴. Although HB 310 gives courts explicit statutory authority to place misdemeanants on probation and to impose many probation conditions, including allowing tolling of probation with certain procedural protections, the bill also increases protections for indigent defendants on probation, with the following procedural changes to the way misdemeanor courts interact with indigent persons.

The bill presents perhaps the most in-depth response to the municipal fine based model. It permits courts to convert fines, surcharges and probation supervision fees to community service (816-818). The bill also requires courts to “waive, modify or convert” fines and fees if the court determines that a defendant has a “significant financial hardship” or “inability to pay” (831-35). HB 310 defines “significant

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financial hardship” as a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months (826-28). The bill creates a rebuttable presumption of “significant financial hardship” if the defendant (a) has a developmental disability; (b) is totally and permanently disabled; (c) is indigent (earns less than 100 percent of the federal poverty guidelines); or (d) has been released from confinement within the last 12 months and was confined more than 30 days. (838-846).

HB 310 also heavily regulates courts in order to prevent judicial complicity in the municipal fine based model. It forbids courts from revoking misdemeanor probation for failure to pay without holding a hearing, inquiring into the reasons for failure to pay, and making an express written determination that the failure to pay was willful. (853-858). It also provides that a judge can terminate probation early even if the defendant still owes fines or fees. (860-63). Additionally it requires judges who conduct revocation hearings for failure to pay/failure to report to consider the use of alternatives to incarceration, community service, or modification of probation (864-68). The bill would also limit the duration of incarceration for failure to pay or report to the lesser of 120 days or the balance of probation.

The bill also regulates private probation companies directly. It limits probation entities (private or government) from charging more than 3 months worth of probation supervision fees in “pay-only” probation cases (888-893). The bill defines “pay-only probation” as cases in which a person is placed on probation solely because he is unable to pay fines/surcharges when the sentence is imposed (883-887). Additionally, the bill provides that probation entities can’t charge supervision fees in pay-only cases after all the fines and surcharges have been paid (891-93). Finally, the bill requires private probation companies to submit information to its governing authority (the city or county) on an annual basis including: number of offenders under supervision; amount of fines, surcharges, restitution collected; amount of probation fees collected (to include supervision fees, electronic monitoring fees, drug test fees, program fees, etc); number of warrants issues. All of this information and all of the “rules, regulations, operating procedures, and guidelines” of private probation companies is subject to the Open Records Act. (1209-1226).

Although HB310 does increase the purview of private probation companies in Georgia, the language in the bill increasing procedural

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protections for indigent defendants and increasing transparency requirements for private probation companies serves as perhaps the most complete model for other states looking to address the issue of financialized courts.

LEGISLATION: TWITTER SHAMING EDITION AND THE POWER OF INCREASING AWARENESS

The legislative aspect of reform requires both positive legislation and the prevention of harmful legislation. As the following example shows, raising awareness can, in addition to passing reform legislation, use the glaring light of media attention to prevent low key attempts to pass harmful legislation. In Alabama, a bill that would have increased the purview of private probation companies in the state without providing any protections for indigent individuals was successfully thwarted by the efforts of Lisa Borden. In March 2014, Ms. Borden learned that the bill was being quietly sent to the judiciary committee and was going to the legislative floor for a vote the next day.²⁰⁵ Ms. Borden knew that the bill's sponsor, State Senator Cam Ward, was an avid twitter user, so she began tweeting her concerns about the bill at him. Others began to follow Ms. Borden's lead and expressed concern about the bill, prompting Senator Ward to invite Ms. Borden to discuss the bill the next morning.²⁰⁶ Ms. Borden spent the evening working with attorneys from the Southern Poverty Law Center to draft amendments to the bill that would protect indigent defendants and limit the reach of the private probation companies. While Ms. Borden met with Senator Ward, the local media picked up the story. Ultimately, the bill died and never came up for a vote that day. Ms. Borden believes that shedding light and increasing public focus on these kinds of bills can go a long way toward altering or stopping them from passing entirely. Ms. Borden also noted that confronting Senator Ward with alternatives to the bill likely played a large role in successfully halting its passage.²⁰⁷

Following Ms. Borden's lead, advocates can inform politicians and the general public about the negative consequences of the municipal fine based model and the increasing complicity of municipal court systems in the problem. Currently, many people do not know that courts aggressively collect LFOs from people in poverty. A LexisNexis search for secondary materials on "legal financial obligations" only resulted in 54 law review articles on the topic.²⁰⁸ In comparison, the same

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search for “stop and frisk” netted over 3,000 results.²⁰⁹ If legal scholars, people who devote their lives to researching judicial institutions, do not know about the abuses of LFO regimes, then most citizens are probably not aware of them either. By monitoring court conduct and publishing detailed reports on observed abuses, advocates can educate the public on LFO practices and spur action to address them. The ACLU pursued this strategy when it released a report on debtors’ prisons in 2010.²¹⁰ Their research received coverage from national news outlets, such as Salon.com²¹¹ and regional newspapers like the Cleveland Plain Dealer.²¹²

Conducting more research about the effects, both fiscal and social, of the municipal fine based model can also directly influence political leaders. Many politicians do not recognize the expenses involved in this approach to revenue generation. Educating officials about the price of collecting LFOs would allow them to assess the costs of the system rather than merely reflecting on its potential benefits. This sort of research has produced impressive results. For example, prior to adopting a statewide jail fee, Massachusetts organized a Special Commission to assess whether the fee would be profitable.²¹³ The Commission concluded that the fee would bring in limited revenue because most offenders would be too poor to pay it.²¹⁴ At the same time, the Commission determined that the fee would impose fiscal costs associated with hiring people to monitor offenders’ compliance and social costs as the burden of new debt pressured offenders to commit new crimes.²¹⁵ Based on these findings, Massachusetts rejected the new fee.²¹⁶ By forcing states to grapple with the costs of LFO enforcement, advocates that follow the commission’s lead can persuade politicians that dependency on LFOs may not be in the state’s interest.

BENCH CARDS

Another promising option is the dissemination of bench cards to judges. Ohio pioneered this approach as a response to the ACLU’s report, *The Outskirts of Hope*, which documented the unconstitutional practice of sending people to jail when they owe LFOs and are unable to pay across seven Ohio counties.²¹⁷ Upon publication of the report, the ACLU sent letters to judges across the state and to Chief Justice O’Connor of the Ohio Supreme Court. In its letter to Chief Justice O’Connor, the ACLU detailed its findings and implored the Chief Justice to “take the corrective action needed to bring the practices of

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Ohio's lower courts into compliance with Ohio and federal law, through the promulgation of an Administrative Order, rule of practice or procedure, or appropriate form of uniform guidance."²¹⁸ Chief Justice O'Connor responded with a letter in which she promised to "take a close look at the information you have presented in your letter."²¹⁹ The Supreme Court of Ohio, in conjunction with a number of municipal court judges and the Ohio Public Defender, published a bench card that was distributed to all Ohio state court judges. The bench card provides detailed guidelines to Ohio judges on the difference between court costs and fines and the appropriate collection mechanisms available for each category. (See Appendix B). The bench card includes a table listing the requirements for enforcing fines with jail time and the courts' duties in imposing costs on offenders. The bench card also includes a table with "permitted methods of collection" and "non-permitted methods of collection" for both collecting fines and collecting costs.

The bench card is an efficient way to disseminate legal standards and information to judges across a state. Moreover, a bench card coming from a state's supreme court signals to judges that the topic of court fees and fines is being taken seriously at the highest level. The bench card effectively puts state judges on notice that they are expected to follow the law carefully in imposing and enforcing court fees and fines and that they should be especially wary of violating constitutional protections afforded to indigent individuals.

RULES OF ETHICS

A major obstacle to reforming municipal LFO schemes and practices is that the people who are best able to make a difference are those who operate within those systems. They are the most knowledgeable about the system and its abuses, but may be hesitant to reform it or risk its reputation or their standing with their colleagues. However, if they overcome these fears, they are in a position to report on abuses and to shame their colleagues into ending these unethical practices. In many cases, these practices are prohibited by either state bar or judicial codes of ethics. For example, in Alabama, the second Canon of Judicial Ethics is that a judge should "avoid impropriety and the appearance of impropriety in all his activities."²²⁰ The municipal court in Harpersville, Alabama, certainly failed to live up to this ideal when it wantonly violated the law to such an extent that a fellow judge labeled it an extortion racket. It is encouraging that this court was

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finally disciplined. Yet if Alabama had applied its code of judicial ethics sooner or perhaps more broadly, municipal courts like Harpersville would never get to the point where a lawsuit was required to end their abuses. Other states have similar judicial codes of ethics,²²¹ that if properly used and enforced, could help ensure that judges live up to their obligations to uphold the law.

The same holds true for lawyers. While the onus is largely on judges to stop imposing unethical and often unconstitutional penalties, lawyers are obligated by their state codes of ethics to not facilitate the system. For example, in a comment on a provision concerning meritorious claims and contentions, the Alabama Rules of Professional Conduct note that a lawyer “has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.”²²² Additionally, lawyers in Alabama are obligated to report any abuses that they witness.²²³ These principles exist in many jurisdictions and, ideally, they would be understood to obligate lawyers to report systemic abuses. Too often, these systems perpetuate themselves because the people involved—even those without an interest in perpetuating the abuses—stay silent. If a single person in these systems was willing to report on the inequity that they witnessed, it could have a positive ripple effect in both the local court and surrounding courts. The integrity of the judiciary is its greatest attribute. Yet it relies on the personnel of the judiciary. One way to solve the problem of the municipal fine based model is for these actors to defend the values they swore to uphold in their respective codes of ethics. It might only take one lawyer willing to report abuses to effectively enforce such principles. At the very least, complaints in the local bar would shine a light on abuses in the legal community.

This is not to say that the problem of LFOs is an individual problem resulting from ill-meaning individuals as articulated by former Systemic Justice Project members in the Atlantic: “Local courts and jails are not rife with injustice and racial disparity because they are staffed with ill-meaning personnel; they exhibit these problems because they are the product of structures and policies designed with racial hostility. That is to say, ultimately, these structures and policies have worked precisely as planned.”²²⁴

DEBT FORGIVENESS

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As demonstrated by Harriet Cleveland's story, the fees and fines imposed on people who interact with municipal court systems often have debilitating and long-lasting effects. One approach to mitigating these harmful effects that does not necessarily require engaging directly with the court system would be to apply the concept of debt forgiveness to the fees and fines imposed by courts. Noam Chomsky has written, "debt is a social and ideological construct, not a simple economic fact."²²⁵ This perspective encourages more creativity and flexibility in devising strategies for reducing the burden of debt on individuals and communities.

Debt forgiveness as a theoretical and practical framework has perhaps flourished most in the past few decades in the context of debt held by Global South countries. The Jubilee 2000 movement successfully inserted the idea of debt forgiveness into the conversation around global debt. The Jubilee movement's core belief is "in the Jubilee Year as quoted in Leviticus, those enslaved because of debts are freed, lands lost because of debt are returned, and community is restored. Today, international debt has become a new form of slavery."²²⁶ The Jubilee movement partially positions itself as a response to odious debt, or debt that "(1) was contracted without the informed consent of the country's people or their representatives; and (2) the funds in question were used for purposes that contradicted the interests of the general population."²²⁷ The concept of odious debt could easily be applied to the situation of debts arising for court fees and fines. First, the accumulated fees and fines are often contracted without the informed consent of those they are imposed on. Second, the fees and fines are not in the interests of the general population. They cause enormous disruptions in the lives of individual citizens, wreaking havoc on family and work situations and often leading to a loss of liberty through incarceration that only further exacerbates the debt situation. The money collected from these fees and fines does not benefit the general population. Some debt goes uncollected, other debt costs more to collect than the value of the original fine, and private probation and parole companies siphon off much of what is collected. The concepts of odious debt and jubilee debt forgiveness are ripe to be extended from the debt of the Global South to communities wracked by court fees and fines.

These concepts are already being extended into new areas. For example, Iceland's Progressive Party recently ran on a platform of debt forgiveness and won. The Progressive Party has termed this

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jubilee, “the correction,” and is imposing a tax on three Icelandic banks largely considered to be at fault for Iceland’s financial crisis in order to “go back and correct everyone’s mortgages- basically, forgive the additional debt everyone had built up in 2008 and 2009.”²²⁸

In the United States, the Rolling Jubilee Campaign, organized by Strike Debt, an offshoot of Occupy Wall Street, raised money to purchase debt, keep it out of the hands of collectors, and then abolish it.²²⁹ The campaign was able to abolish \$ 31, 982, 455.76 of debt.²³⁰ The campaign organizers admit that their approach is not necessarily a systemic solution, but they see value in “the possibilities this experiment opens up, the good will that is fostered, the conversations that it sparks and the new ideas and action plans that are percolating.”²³¹ In fact, Strike Debt has officially transitioned into the second phase of their movement building around debt. This phase has been named Debt Collective and focuses on building “debt collectives” or “debtors’ unions” in order to “build power against the creditor class” through “the pursuit of collective bargaining and debt strikes.”²³² On February 23, 2015, The Rolling Jubilee abolished approximately \$13 million of student debt owed by 9,438 people across the United States. At the same time, former students of Corinthian Colleges “declared a debt strike by refusing to pay their federal loans.”²³³

This model of debt forgiveness could be applied directly to the debt resulting from accumulated court fees and fines. An even closer model is the existence of bail funds. Individuals facing bail often plead guilty when they cannot afford the bail amount, “accepting a possibly life-altering record to go home to a child, to continue working, to return to whatever they left in the outside world.”²³⁴ To address this dilemma, the Bronx Defenders, a nonprofit provider of holistic legal services, set up a bail fund called the Freedom Fund.²³⁵ To qualify for funds from the Freedom Fund, an individual must be accused of a misdemeanor and must be able to prove that they have roots in the community and are likely to return to court for their hearing.²³⁶ Moreover, the Freedom Fund will only pay up to \$2,000. The fund initially faced legal obstacles when a judge blocked it for not meeting the same regulations as a for-profit bail bond business.²³⁷ Instead of abandoning the project, the executive director of the Bronx Defenders, Robin Steinberg, and her husband, David Feige, successfully lobbied for the passage of a bill that allowed nonprofit groups to pay the bail for defendants facing misdemeanor charges.²³⁸ Recently, the New York

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City Council recommended allocating \$1.4 million toward a citywide bail fund to provide bail for “defendants charged with low-level misdemeanors with bail set at \$2,000 or less.”²³⁹ Communities across the country can further this model either by crowd-funding to set up grassroots bail funds or lobbying their local governments to allocate funds toward the establishment of an official bail fund.

WARRANT DISMISSAL

A sister approach to debt forgiveness in the context of financialized courts is the idea of warrant dismissals. Warrants can serve as a significant barrier to resolving traffic and other misdemeanor tickets. Once an individual fails to appear in court, a warrant is often issued, leading to fear and a general reluctance to return to court, and exacerbating the fee and fine cycle. In many jurisdictions, new fines are imposed for each failure to appear or pay. Clearing the warrants and allowing individuals to come into court to work out a plan to resolve the underlying citation would greatly mitigate the cyclical trap of the municipal fine based model.

In October 2014, St. Louis County announced that it would “automatically clear outstanding warrants for nonviolent traffic violations and allow offenders to reset court dates without a fee so long as they act by year’s end, making it the most progressive warrant forgiveness program in the region.”²⁴⁰ 220,000 outstanding warrants were automatically forgiven, with affected people receiving postcards informing them that they had until December 31, 2014 to go to the municipal court and schedule a new court date.²⁴¹ Since many people have multiple outstanding warrants in St. Louis County, approximately 70,000-80,000 individuals received postcards.²⁴² A failure to schedule a new court date before the year’s end resulted in the reinstatement of the warrant. This approach was a direct response to conversations in the wake of the killing of Michael Brown by Officer Darren Wilson, in which advocates and activists brought the issue of debilitating court fees and fines to the forefront. The St. Louis program differed from other warrant forgiveness programs in that it did not impose a fee and instead automatically cleared the warrant.²⁴³ However, as of December 10, 2014, only 3,300 individuals had taken advantage of the ninety-day amnesty, signaling that coming into court was likely still intimidating for many, or that they were insufficiently informed of the program or its relevance to their personal situation. The low response rate to the program demonstrates that

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approaches such as temporary warrant dismissal, although a welcome gesture from city governments, are not enough to mitigate the harmful impact of LFOs on individuals who are poor.

REENTRY PROGRAMS

As discussed above, some states have Pay-to-Stay programs that charge inmates fees for each day they spend in prison. Upon release, ex-offenders in these states have no income, limited job prospects due to their criminal background, and hefty bills. Reentry programs have the potential to reverse this scenario. By offering ex-offenders credits toward their fees for each day they attend a job training program, states with Pay-to-Stay laws can encourage recently released inmates to gain skills that will help them launch a new career while simultaneously reducing their legal debt burden. In 2010, Suffolk County, Massachusetts piloted a voluntary reentry program that allowed ex-offenders to attend job readiness classes in exchange for a reduction in their fines.²⁴⁴ As the table below demonstrates,²⁴⁵ this program had successful results. The low rate of recidivism is particularly impressive given that the general reoffending rate in Massachusetts is 50%.²⁴⁶

Table 1: Results of Massachusetts reentry pilot program

Participants	Completers	Found Work	Reoffended
26	11	20	5

Source: Brennan Center for Justice

Reentry programs suffer from several potential drawbacks. First, they only make sense as a way to reduce fees of people who have served prison time. Individuals subject to LFOs for misdemeanor offenses may have a job and therefore not need to spend time taking job training courses. Second, reentry programs normalize LFOs by connecting them with legitimate institutions such as job training organizations. This link may cause the general public to associate LFOs with non-profits that serve the marginalized and therefore perceive legal debt as something that helps disenfranchised groups rather than harms them. Third, these programs result in offenders weighed down by illegitimate debt burdens having no other choice than to enter these programs. Nonetheless, in communities where

more systemic solutions are not feasible, reentry programs can help some individuals struggling with LFOs reduce their burden.

CASE STUDY: ST. LOUIS

Having described the causes and context of the municipal fine based model and profiled some tools available to bring about change in jurisdictions across the country, the final section of this paper offers a case study outlining what a systemic solution might entail. This section begins by describing the history of racial tension and segregation in St. Louis and illustrating the racist nature of policing practices throughout the county. Against this backdrop, we depict the incredibly oppressive impact of the municipal fine based model as implemented by St. Louis County municipal courts. Finally, we conclude by discussing the systemic approach employed by activists and reformers in the past year in the fight against this system. These efforts demonstrate how drawing on the full catalogue of tools identified and designing a multi-pronged, systemic approach can begin to address this problem and dismantle some of its underlying causes.

BACKGROUND

St. Louis County is home to nearly one million people and made up of 90 separate municipalities centered around the city of St. Louis, MO. Suffering from severe racial and economic segregation, recent events have brought increased attention to the over-policing and incarceration of marginalized communities in the county, giving considerable energy to a movement for changes to the law enforcement system and beyond. Accordingly it offers a compelling subject for this paper's case study.

St. Louis County is one of the most racially segregated metropolitan areas in the country, a characteristic dating back centuries.²⁴⁷ St. Louis passed the first law *requiring* residential segregation, and a pervasive system of racially restrictive covenants was then introduced into real estate contracts. Although an effort to codify the racially restrictive covenants into statute was ruled unconstitutional, these practices created clear dividing lines in St. Louis that endure to this day.²⁴⁸

Segregation was further exacerbated by the white flight to the suburbs. Between 1950 and 1970, the city lost nearly 60% of its white

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population. White flight was partly underwritten by the federal government, which secured loans reserved for whites and redlined (denied government assistance to) mixed race neighborhoods. As whites left the city, they established new municipalities that aimed to exclude blacks and the poor through zoning regulations that forbade rentals and required homes to be built on large, more expensive lots.

As a result of this history, what remains in St. Louis County are 90 small racially and economically segregated municipalities. During the recent uproar, the Washington Post noted you could “drive an approximately 10-mile stretch along the east-west Route 115, and cross through sixteen different municipalities.”²⁴⁹ Each municipality maintains its own municipal services and 81 of the municipalities run their own municipal courts, while 58 maintain their own police departments.²⁵⁰ Many of these tiny municipalities struggle to raise revenue and thus rely on a system of LFOs to fund municipal services.

Contact with local law enforcement is residents’ point of entry into the municipal court system. Black drivers in Missouri are stopped by the police at a rate 63% greater than their proportion of the population.²⁵¹ The table below illustrates the racial disparities that occur in traffic stops in three counties.

Table 2: Police Stops in North St. Louis County Municipalities

City	Black Population	Percentage of Stops Involving Black Motorists	Searches (Black vs. White Motorists)	Arrests (Black vs. White Motorists)
Bel-Ridge	83%	76%	1.4% vs. 0%	4.1% vs. 0%
Ferguson	67%	86%	12.1% vs. 6.9%	10.4% vs. 5.2%
Florissant	27%	57%	15.8% vs. 8%	14.9% vs. 7.2%

Source: MO Annual Vehicle Stops Report

In addition, black citizens are twice as likely to be searched (12.1% vs. 6.9%) and twice as likely to be arrested (10.4% vs. 5.2%), despite the fact that searches of black individuals produced contraband only 21% of the time, as opposed to 34% of the time for white individuals.²⁵² Not surprisingly, being targeted by the police leads to higher rates of misdemeanor charges and LFO imposition.

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MUNICIPAL COURT SYSTEM

It is against this fabric of experiences that people enter St. Louis County's municipal court system, which embodies many of the problems associated with the municipal fine based model and financialized courts discussed in this paper. LFOs are imposed as a means to raise municipal revenue where property taxes fall short, meaning law enforcement tends to disproportionately target already marginalized communities in charging misdemeanor offenses. Summarizing the extent of this problem, Thomas Harvey, Executive Director of ArchCity Defenders, describes: "Poor people and communities of color continue to be unconstitutionally excluded from [these] courts. [The] [p]oor continue to be unconstitutionally incarcerated because of their poverty. And poor people are being forced into homelessness as a result of the reliance on municipal courts for revenue."²⁵³

As noted above, 81 of 90 municipalities in St. Louis County have their own municipal courts to enforce city ordinances. Courts throughout the county rely on revenue from LFOs to not only fund the court system, but also to reap substantial additional revenue. Of the 81 municipal courts, all but seven are able to turn a profit.²⁵⁴ There is an array of staggering statistics concerning the magnitude of this problem: the average municipal court in St. Louis County takes in about half a million dollars more than it costs to run the court; twenty-one towns earn more than 20 percent of their revenue from municipal courts; and for 14 towns, municipal court fines make up the biggest source of revenue. In fact, St. Louis County collects a disproportionate share of fines; although only 11% of the state's population lives there, 34% of the state's fines originate in the county.²⁵⁵

Their reliance on LFO revenue makes courts in the county particularly aggressive in prosecuting misdemeanor offenses. For example, in 2013 Ferguson's municipal court disposed of 24,532 warrants, which corresponds to three warrants per household. Arrests jumped 30% from 2010 to 2013, reaching such high levels that decision-makers have discussed creating a kiosk to pay ticket fines.²⁵⁶ Not surprisingly, the towns that rely most heavily on revenue from LFOs are majority African American, which means that the heaviest burden of the offender-funded model in St. Louis County falls on poor, black families.

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Former Systemic Justice Project members Blake Stroke and Whitney Bennis tell the story of the experience of being poor and Black in a St. Louis municipal court in an article in the Atlantic:²⁵⁷

“Walk into one of these courts on any given day—in Ferguson, Pagedale, Pine Lawn, Hazelwood, St. Ann, or easily 40 other municipalities across St. Louis County—and there will be row after row of poor black residents who have been called in to pay penitence for their wrongdoing. Some who are unable to pay are taken straight to the local jail. More often, when people fail to appear because they know that they cannot pay, arrest warrants are issued. Days, weeks, months, or even years later (often times during a routine traffic stop), they will be arrested and taken to jail on this warrant, with the threat of continued confinement serving as a new incentive for immediate payment, no matter the resultant hardships of securing such funds. Detentions stemming from unpaid municipal fines can last anywhere from minutes to weeks or, in extreme cases, even months. [And] for many people throughout the St. Louis region, the nightmare of debtors’ prison is a recurring one: Each time a payment or court date is missed, the court issues another warrant, and the individual is subject to arrest, jail, and additional fines and court fees ... This is the reality of the local justice system for some of the most vulnerable residents of Greater St. Louis.”

THE SOLUTION: A SYSTEMIC APPROACH

In the last year, prompted by calls for change from community activists, St. Louis County has taken steps to address the rise of the municipal fine based model utilizing a varied approach comprised of a number of the tools profiled here. The best solution to the municipal fine based model would be a similarly systemic approach.

As detailed above, *targeted litigation* can be a powerful response to this issue. In 2016, the Department of Justice filed suit against the City of Ferguson after the City Council rejected a proposed settlement that sought reforms to the police department and municipal court.²⁵⁸ Attorney General Loretta Lynch brought suit against Ferguson. The lawsuit charges the City with a number of different civil rights claims ranging from violations of Equal Protection and Due Process, to patterns of unlawful arrest and excessive force. In announcing the decision to sue Ferguson, Attorney General Loretta Lynch stated that:

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“the residents of Ferguson have waited decades for justice. They should not be forced to wait any longer.”²⁵⁹

In addition, Lawyers at Arch City Defenders, Equal Justice Under Law, and St. Louis University have brought lawsuits against multiple St. Louis municipalities. Lawyers sued Ferguson and Jennings counties for operating what they describe as debtor’s prisons, jailing people for their inability to pay LFOs.²⁶⁰ Jennings settled in August of 2015; the settlement provides numerous provisions that undermine the city’s municipal fine based model, including most notably including the elimination of criminal processes for collecting fines and fees.²⁶¹ A group of lawyers also filed a federal civil rights lawsuit against Velda City for unconstitutional bail practices, leading to a settlement along similar lines as the one in Jennings.²⁶² *Litigation* has also been used to challenge the collection of revenue from municipal courts. Missouri Attorney General Chris Koster filed suit against 13 St. Louis County municipalities for violating a state law that caps the percentage of a city’s budget that can be comprised of ticket revenue at 30%.²⁶³ In addition, the Department of Justice recently reached a settlement agreement with the city of Ferguson to resolve a lawsuit alleging numerous constitutional violations.²⁶⁴

Legislation and policy reform have also been proposed. The St. Louis municipal court system adopted a new rule to take into account an individual’s ability to pay when handing out fines for minor traffic and municipal offenses. In addition, as detailed above, in October 2014, the city’s municipal court announced that it would automatically clear outstanding warrants for nonviolent traffic violations and allow offenders to reset their court dates without a fee so long as they acted by the end of the year.²⁶⁵

Sustained efforts to raise public awareness have led to increased attention on St. Louis County municipal court practices, including its reliance on the offender-funded model and system of LFOs to raise revenue. Court monitoring by Arch City Defenders as well as a detailed report compiled by the Department of Justice’s Civil Rights Division shed important light on the breadth and complexity of this problem in St. Louis. Arch City Defenders also supports defendants directly in municipal court through free representation. All these efforts have been bolstered and energized by the ongoing local and national Black Lives Matter movement, which has helped keep alive the conversation

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about St. Louis' financialized courts and the disparate impact they have on low-income minority communities.

The multifaceted efforts in St. Louis partially represent a somewhat systemic approach, though the movement still in its early stages. Moving forward, as political space is opened up by litigation and awareness campaigns, action should be taken on four different fronts: court reform, local government reform, criminal justice reform, and voluntary elite reform—for instance, the dissemination of judicial bench cards—should be encouraged. Several different proposals for court reform already exist in St. Louis County. Reformist judges have put together a “cafeteria order” of possible reforms, including:

- “Limiting the number of “failure to appear” charges to one a case;²⁶⁶
- Allowing a citizen to obtain one continuance by phone without appearing in court;
- Barring detention or arrest due to inability to pay;
- Ensuring the defendant has access to the court file;
- Payment plans to accommodate poor defendants;
- Preventing court administrators from issuing warrants on behalf of the judge without following court procedures;
- Payment of fines through a violation bureau that standardizes fines and prevents excessive fines;
- Early opening of court for citizens seeking to avoid long waits;
- Substitution of community service for fines.”²⁶⁷

In their effort to leverage the effectiveness of *motion practice* and the provision of direct services, lawyers at Arch City Defenders are also calling for all defendants in municipal court to be guaranteed a public defender.²⁶⁸

Pursuing local government reform will help address one of the major underlying causes of this problem. The number of municipalities in St. Louis County has helped cement racial and economic segregation

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and encouraged a reliance on LFOs to run duplicative services. Therefore, one solution would be to amalgamate St. Louis County. Another possibility would be to legislate and enforce the requirement that profit from LFOs only be used to fund re-entry programs, and not flow directly into general municipal budgets.

Broad criminal justice legislative reform is also necessary. Fines and fees should always be proportional to defendant's income. This proportional system of fines, known as "day fines," is already the norm in several northern European countries including Norway. Non-punitive sentences are also a potential solution. One example already commonly in use is providing that defendants must perform a certain amount of community service rather than fining them. Another solution is to just get rid of the fines for these minor offenses altogether. Many of these offenses are regulatory in nature and hence do not require the high fines that municipalities attach to them. Finally, one could take these often minor issues out of the formal criminal justice system altogether. Local community courts, courts staffed and run by local communities, often provide a far better forum for minor regulatory offenses because these offenses are most directly harms to the community. These courts, which have a greater focus on communal justice and individually tailored sentences, are already used in use in many areas, including New York.²⁶⁹

Finally, voluntary elite reform should be supported. Efforts are already being discussed to prepare a judicial bench card to provide information to both both defendants and judges in municipal court, explaining that appearing in court without enough money to pay a fine will not result in arrest. Activists in St. Louis should also consider leveraging the untapped resource that exists in the form of the rules of ethics. Lawyers, both prosecutors and defense attorneys, should be reminded of the code, encouraged to report abuses, and protected when they do.

CONCLUSION

Long-term change will require systemic solutions that address not only the financialization of courts and the municipal fine based model's reliance on LFOs, but also help dismantle the root causes of this and other persistent social injustices. A systemic plan should draw on the full universe of tools available, as resources permit. The heart

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of a systemic solution is a sustained and targeted, multi-stakeholder, popular campaign. It requires both proactivity in terms of helping individual offenders caught up in the system, raising awareness about the problem, and then using that awareness to spur legislative reform addressed at the root causes of the problem. The provision of direct services, creation of reentry programs, and strategically deployed litigation can help individuals trapped in the system and increase the cost of the offender-funded model for municipalities. Taking these actions is the necessary work of those, like ArchCity Defenders, that wish to attack the municipal fine based model vis-à-vis the court system. But focusing on helping those caught up in the system on an individual basis is not enough to transform the system. Any plans to undermine the municipal fine based model should also seek to increase awareness about the urgency, pervasiveness, and magnitude of this problem, change perceptions of the victims ('offenders'), and ultimately open up political space for more structural changes. By galvanizing popular support and outrage, activists can ensure that the main cause of the municipal fine based model—popular ignorance of the problem—no longer blocks reform. Finally, building upon popular outrage, the campaign to end municipal fine based systems must advocate for, and secure, passage of legislative reform on all fronts to increase the likelihood of long-term change. This reform should be aimed at addressing the underlying causes of the offender-funded model: the paucity of resources in local government, the debilitating cost of mass incarceration, and the gaps in the applicable legal doctrine.

LIST OF APPENDICES

Sample Indigency Motion from Lisa Borden (pages 1-3)

Ohio Judicial Bench Card (pages 4-5)

Summary of Georgia House Bill 310 (pages 6-9)

Mitchell v. City of Montgomery, Settlement Agreement (pages 10 – 42)

FURTHER READING

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³⁹ Shapiro, *supra* note 4.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, e.g., Washington's system of fines and fees, as described in Michael L. Vander Giessen, Note, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 GONZ. L. REV. 547 (2012).

⁴³ See, e.g., New Orleans' scheme as described in *In For a Penny: The Rise of America's New Debtors' Prisons*, American Civil Liberties Union, 17 (Oct., 2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf.

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⁴⁵ *Id.* at 10.

⁴⁶ *Id.*

⁴⁷ *Id.* at 12.

⁴⁸ *Id.* at 10.

⁴⁹ Rachel L. McLean and Michael D. Thompson, *Repaying Debts*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, 7, available at http://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_full_report-2.pdf (last visited May 5, 2015).

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⁵⁵ Jeremy Kohler, *State Auditor Announces Audits of St. Louis-Area Municipal Courts*, ST. LOUIS POST-DISPATCH (Oct. 9, 2014), http://www.stltoday.com/news/local/metro/schweich-announces-which-municipal-courts-will-be-audited/article_6d8424e8-4118-571f-bego-3fcaboc27187.html.

⁵⁶ Human Rights Watch, *Profiting From Probation*, *supra* note 3 at 49.

⁵⁷ *Id.* at 61.

⁵⁸ *Id.*

⁵⁹ Martin J. Reed, *Harpersville Mayor: Loss of Court Revenue Causing Budget Shortfall*, Alabama Media Group (May 17, 2013), http://blog.al.com/spotnews/2013/05/harpersville_mayor_loss_of_co_u.html.

⁶⁰ Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, BRENNAN CENTER FOR JUSTICE, 9, <http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf> (last visited May 5, 2015).

⁶¹ *Id.* at 18.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 19. From 2007-2008, over 800 people went through this entire process in Leon County. While data does not exist for the people who only completed some steps in this cycle, the total number of individuals who interacted with the LFO regime is likely in the thousands.

⁶⁹ *Id.* at 15.

⁷⁰ *Id.* at 19.

⁷¹ *Id.*

⁷² The Brennan Center's analysis only considered offenders who went to jail for their debts. Imprisonment greatly raises the cost of enforcement and so, assuming that Leon County does not regularly lock up its legal debtors, it may make a greater profit off other offenders. *Id.* Additionally, Leon County officials argued that jailing debtors, though costly, helped encourage future offenders to pay

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their debts in a timely way. The County argued that the deterrence gains from its use of jail outweighed the costs. *Id.* at 39 n. 125.

⁷³ Whitney Bennis and Blake Stroke, *Debtors' Prisons in 21st Century America*, THE ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/>.

⁷⁴ Mclean and Thompson, *supra* note 49 at 17.

⁷⁵ Whitney Bennis and Blake Stroke, *Debtors' Prisons in 21st Century America*, THE ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/>.

⁷⁶ Diller, *supra* note 60 at 21; Human Rights Watch, *supra* note 3 at 13.

⁷⁷ Human Rights Watch, *supra* note 3 at 15.

⁷⁸ *Id.*

⁷⁹ *Id.* at 56.

⁸⁰ *Id.* at 39.

⁸¹ *Id.* at 40. The report also quoted several top officials at probation firms who expressed their commitment to fairly applying the *Bearden* standard. *Id.*

⁸² LFOs have also had subtle effects on procedural rights. For example, Florida state law requires clerks of court to work with offenders to create individualized repayment plans based on their income. Clerks routinely ignore this obligation, instead imposing the same payment schedule and structure on all offenders who request a payment plan. Increased administrative responsibility, including monitoring legal debtors' compliance, may explain why clerks fail to uphold their statutory duties. See Diller, *supra* note 60 at 14.

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⁸⁴ Tom R. Tyler and Justin Sevier, *How Do the Courts Create Popular Legitimacy: The Role of Establishing The Truth, Punishing Justly, And/Or Acting Through Just Procedures*, 77 ALBANY L. REV. 1095, 1103-04 (2013-2014).

⁸⁵ Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1977).

⁸⁶ Tyler and Sevier, *supra* note 82 at 1096.

⁸⁷ *Id.* at 1098-1100.

⁸⁸ Kevin M. Carlsmith, John M. Darley, and Paul H. Robinson, *Why Do We Punish?: Deterrence and Just Deserts as Motives for Punishment*, 83 J. OF PERSONALITY AND SOC. PSYCHOL. 284, 295 (2002).

⁸⁹ Tyler and Sevier, *supra* note 82 at 1096.

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⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Human Rights Watch, *supra* note 3 at 29.

⁹³ Diller, *supra* note 60 at 16.

⁹⁴ *Id.*

⁹⁵ Jeremy Travis and Bruce Western, Editors; Committee on Causes and Consequences of High Rates of Incarceration; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequence*, The National Academies Press, 36 (2014), available at http://www.nap.edu/catalog.php?record_id=18613. For a glimpse of the raw numbers and trends over time, see E. Ann Carson, *Prisoners in 2013*, Bureau of Justice Statistics 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

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⁹⁷ *Id.*

⁹⁸ Ta-Nehisi Coates, *Mapping the New Jim Crow*, *The Atlantic* (Oct. 17, 2014, 2:19PM), available at <http://www.theatlantic.com/politics/archive/2014/10/mapping-the-new-jim-crow/381617/>.

⁹⁹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 6 (2d. ed. 2012).

¹⁰⁰ Hamilton Commission, *US Incarceration Rate Compared to Other Countries* (May 1, 2014), available at http://www.hamiltonproject.org/papers/ten_economic_facts_about_crime_and_incarceration_in_the_united_states/.

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¹⁰² Alexander, *supra* note 97 at 49.

¹⁰³ Alexander, *supra* note 97 at 51-52.

¹⁰⁴ Carson, *supra* note 94 at 46.

¹⁰⁵ United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Chapter 2 at 23 (October 2011), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

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¹⁰⁶ Melissa S. Kearney, Benjamin H. Harris, Elisa Jacome, and Lucie Parker, *Ten Economic Facts about Crime and Incarceration in the United States*, The Hamilton Project, 2 (May, 2014), available at http://www.brookings.edu/~media/research/files/papers/2014/05/01%20crime%20facts/v8_thp_10crimefacts.pdf.

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¹⁰⁸ *Id.*

¹⁰⁹ See Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, The Hamilton Project (Feb. 24, 2015, 7:15AM), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq> (describing this phenomenon).

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¹¹¹ 524 U.S. 321 (1998).

¹¹² *Id.* at 334.

¹¹³ Kary L. Moss, *Debtors' Prisons in Michigan: the ACLU Takes up the Case*, 89 MICH. B.J. 40, 41 (July 2010).

¹¹⁴ 461 US 660, 668-69 (1983).

¹¹⁵ *Id.* at 662

¹¹⁶ See 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, 394 (2010) (describing the impact of this loophole in *Bearden's* holding).

¹¹⁷ 257 Ga.App. 190, (2002).

¹¹⁸ *Bearden*, 461 U.S. at 674.

¹¹⁹ 767 F.Supp. 243, 248 (1991).

¹²⁰ *Investigation of the Ferguson Police Department*, *supra* note 24 at 44.

¹²¹ See Hannah Rapplepe and Lisa Riordan Seville, *The Town That Turned Poverty Into a Prison Sentence* (Mar. 14, 2014), available at <http://www.thenation.com/article/178845/town-turned-poverty-prison-sentence> (describing this incident).

¹²² See John L. Campbell, *Ideas, Politics, and Public Policy*, 28 ANNUAL REVIEW OF SOCIOLOGY 21, 23-24 (2002).

¹²³ *Id.*

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¹²⁵ Adam Benforado and Jon Hanson, *The Great Attributional Divide: How Divergent Views Are Shaping Legal Policy*, 57 EMORY L.J. 311, 311 (2008).

¹²⁶ Jon Hanson and Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345, 1360 (2008).

¹²⁷ *Id.*

¹²⁸ *See id.* at 1361.

¹²⁹ Benforado and Hanson, *supra* note 124 at 1354.

¹³⁰ Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOLOGICAL BULLETIN, 556, 557-58 (2000).

¹³¹ *See id.* at 564.

¹³² Benforado and Hanson, *supra* note 124 at 326.

¹³³ John T. Jost, Mahzarin R. Banaji, and Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POLITICAL PSYCHOLOGY 881, 882 (2004).

¹³⁴ Benforado and Hanson, *supra* note 124 at 1361.

¹³⁵ Gary Blasi and John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIFORNIA LAW REVIEW, 1119, 1121 (2006).

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¹⁴³ Benforado and Hanson, *supra* note 124 at 323-24.

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¹⁴⁶ *Id.*

¹⁴⁷ See R.J. Sampson and W.J. Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in RACE, CRIME, AND JUSTICE: A READER 177 (Shaun L. Gabbidon and Hele Taylor Greene eds., 2005).

¹⁴⁸ See Jost et al., *supra* note 132 at 890.

¹⁴⁹ See generally, Jon Hanson and Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006).

¹⁵⁰ See The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, 3 (Sep., 2014), available at http://www.sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf.

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¹⁵³ *Id.*

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¹⁵⁵ Hanson and Hanson, *supra* note 148 at 437.

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¹⁵⁷ Jennifer Fitzgerald, K. Amber Curtis, and Catherine L. Corliss, *Anxious Public: Worries about Crime and Immigration*, 45 COMPARATIVE POLITICAL STUDIES 477, 484-85 (2012).

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¹⁶⁰ American Civil Liberties Union, *In For a Penny*, *supra* note 43.

¹⁶¹ *Id.* at 49

¹⁶² *Id.*

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- ¹⁶⁸ *Id.* at 50.
- ¹⁶⁹ Diller, *supra* note 60 at 9.
- ¹⁷⁰ *Id.*
- ¹⁷¹ See *Bearden v. Georgia*, 461 US 660 (1983).
- ¹⁷² See *Tate v. Short*, 401 US 395 (1971).
- ¹⁷³ See *Alabama v. Shelton*, 535 U.S. 654 (2002).
- ¹⁷⁴ Telephone Interview with Lisa Borden, Pro Bono Shareholder at Baker Donelson (Feb. 23, 2015).
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- ¹⁸³ See, *supra*, Narratives section.
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²³⁹ *New York City Council Wants to Add Police, Create Bail Funds*, N.Y. Times (Apr. 14, 2015), <http://www.nytimes.com/aponline/2015/04/14/us/ap-us-city-council-budget-nyc.html>.

²⁴⁰ Nicholas J.C. Pistor, *St. Louis to forgive about 220,000 warrants for nonviolent municipal offenses*, ST. LOUIS POST-DISPATCH (October 1, 2014, 12:00AM), available at http://www.stltoday.com/news/local/crime-and-courts/st-louis-to-forgive-about-warrants-for-nonviolent-municipal-offenses/article_7f9dbef3-7409-5e81-ae28-3c79faa8b147.html.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See city amnesty program described at Jennifer S. Mann, *65 St. Louis County municipalities join holiday warrant forgiveness program*, ST. LOUIS POST-DISPATCH (November 19, 2014), available at http://www.stltoday.com/news/local/crime-and-courts/st-louis-county-municipalities-join-holiday-warrant-forgiveness-program/article_0101d9c5-af16-5080-9e96-204dbf9fad61.html.

²⁴⁴ Patel and Philip, *supra* note 212, at 11-12.

²⁴⁵ Data in table from *id.*

²⁴⁶ *Id.*

²⁴⁷ Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), <http://www.propublica.org/article/ferguson-school-segregation>; A study by Project US 2010 relying on 2010 census data found that St. Louis was the ninth most segregated metropolitan area in the nation (John Logan and Brian Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, (Mar. 24, 2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>).

²⁴⁸ Hannah-Jones, *supra* note 244.

²⁴⁹ Balko, *supra* note 5.

²⁵⁰ POST-DISPATCH, (Mar. 28, 2015).

²⁵¹ MO. ATT'Y GEN. News Release, *AG Issues annual Vehicle Stops Report*, (May 30, 2014), http://ago.mo.gov/newsreleases/2014/AG_issues_2013_Vehicle_Stops_Report/.

²⁵² Thomas Harvey, John McAnnar, Michael-John Voss, Megan Conn, Sean J. O'Sullivan, & John S. Packer, *Harvey Law Center: Municipal Courts Financialized Courts: The Disparate Impact of the Municipal Fine Based Justice System*

White Paper, (Nov. 23, 2014), available at <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>.

²⁵³ William Freivogel, *Two Visions of Municipal Court Reform*, (Nov. 12, 2014), <http://news.stlpublicradio.org/post/two-visions-municipal-court-reform>.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Jesse Bogan, *As low-income housing boomed, Ferguson pushed back*, (Oct. 19, 2014), ST. LOUIS POST-DISPATCH, available at http://stltoday.com/news/local/metro/as-low-income-housing-boomed-ferguson-pushed-back/article_fcb97a3c-8bb7-54a5-9565-255301753142.html?mobile_touch=true.

²⁵⁷ Whitney Bennis and Blake Stroke, *Debtors' Prisons in 21st Century America*, THE ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/>.

²⁵⁸ Matt Ford, *United States v. Ferguson*, THE ATLANTIC (Feb. 11, 2016), <http://www.theatlantic.com/politics/archive/2016/02/doj-ferguson-lawsuit/462300/>.

²⁵⁹ Whitney Bennis and Blake Stroke, *Debtors' Prisons in 21st Century America*, THE ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/>.

²⁶⁰ Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson Over 'Debtor's Prisons*, NATIONAL PUBLIC RADIO (Feb. 8, 2015), <http://www.npr.org/blogs/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons>.

²⁶¹ See Rachel Lippmann, *Jennings settles federal lawsuit over its municipal court debt*, THE ST. LOUIS AMERICAN (AUG. 27, 2015, 6:18PM), available at http://www.stlamerican.com/news/local_news/article_egef9a6e-4d11-11e5-beed-67d949326494.html.

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²⁶⁴ ***Ferguson and DOJ enter consent decree to resolve lawsuit***, ST. LOUIS POST-DISPATCH (March. 17, 2016), available at http://www.stltoday.com/news/local/crime-and-courts/ferguson-and-doj-enter-consent-decree-to-resolve-lawsuit/article_cad8a3eo-of9d-57e6-b980-aed35f4oed62.html.

²⁶⁵ “For those who do not act by the end of the year, the warrants will be put back into place.” (Nicholas Pistor, *St. Louis to forgive about 220,000 warrants for nonviolent municipal offenses*, ST. LOUIS POST-DISPATCH (Oct. 1, 2014), available at http://www.stltoday.com/news/local/crime-and-courts/st-louis-to-forgive-about-warrants-for-nonviolent-municipal-offenses/article_7f9dbef3-7409-5e81-ae28-3c79faa8b147.html).

²⁶⁶ Currently a person who fails to show up on a case involving six traffic charges could end up with six “failure to appear” charges.

²⁶⁷ Freivogel, *supra* note 251.

²⁶⁸ Thomas Harvey et al., *supra* note 250.

²⁶⁹ See generally Center For Court Innovation, *Community Court*, <http://www.courtinnovation.org/topic/community-court>.