Fines, Fees, and Forfeitures

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The use of fines, fees, and forfeitures has expanded significantly in recent years as lawmakers have sought to fund criminal justice systems without raising taxes. Concerns are growing, however, that inadequately designed systems for the use of such economic sanctions have problematic policy outcomes, such as the distortion of criminal justice priorities, exacerbation of financial vulnerability of people living at or near poverty, increased crime, jail overcrowding, and even decreased revenue. In addition, the imposition and collections of fines, fees, and forfeitures in many jurisdictions are arguably unconstitutional, and therefore create the risk of often costly litigation. This chapter provides an overview of those policy and constitutional problems and provides several concrete solutions for reforming the use of fines, fees, and forfeitures.

INTRODUCTION

The use of fines,[1] fees, and forfeitures of cash and property are long-standing practices[2] that have boomed in recent years as lawmakers have sought to fund an

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1. I use the term "fines" here to include statutory fines as well as surcharges, the latter of which are imposed as an additional set amount or percentage of the underlying statutory fine and which are often designated for a particular purpose. *See, e.g.*, Cal. Penal Code § 1465.8 ($40 surcharge designated for court operations). I also include restitution made directly payable to crime victims. Criminal debt resulting from restitution awards implicate the same concerns regarding entrenched poverty, familial disruption, criminal justice involvement, and jail overcrowding described in Part I.B, *infra*. Further, restitution raises many of the same constitutional issues described in Part II. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660 (1983) (prohibiting probation revocation for failure to pay restitution without a determination of whether the defendant had the ability to pay); Paroline v. United States, 134 S. Ct. 1710, 1726 (2014) (suggesting that it would interpret the term "fine" to include restitution for purposes of the Excessive Fines Clause). And while restitution is not designed in the first instance to generate revenue for the government, because it has the capacity to offset other governmental expenses, it also can distort criminal justice incentives such as those described in Part I.A, *infra*. Finally, this chapter does not address unique issues that might be raised with respect to the use of fines, fees, and forfeitures in the white-collar context or against corporate defendants.

2. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 107 Cal. L. Rev. 277 (2014).

expanding criminal justice system without raising taxes.[3] In many jurisdictions, economic sanctions begin accruing from the moment one is stopped by the police (e.g., fees for law enforcement costs and pretrial detention), to trial (e.g., public-defender fees or jury costs), through sentencing (e.g., incarceration or probation costs, statutory fines, surcharges, and restitution), and collections (e.g., interest charges or collection fees).[4] For those without the means to pay, the consequences can be drastic. The inability to pay economic sanctions may result in the imposition of what have come to be known as "poverty penalties": interest and collections costs, probation and a host of related fees for probation services, the loss of government licenses and benefits, and even incarceration.[5] The use of forfeitures is also ubiquitous,[6] including the growing use of what are known as "civil asset forfeitures," which are imposed without a criminal

3. *See* Council for Economic Advisors, Fines, Fees, and Bail 3 (Issue Brief Dec. 2015); Katherine D. Martin et al., Harvard Kennedy School & Nat'l Inst. of Justice, Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create 4 (Jan. 2017); Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 5 (2d ed. 2015) (noting that the value of federal forfeitures increased 4,667% between 1986 and 2014).

4. *See* Colgan, *supra* note 2, at 284–90.

5. *See* Criminal Justice Policy Program, Harvard Law School, Confronting Criminal Justice Debt: A Guide for Policy Reform 15–16 (2016); Colgan, *supra* note 2, at 282; Human Rights Watch, Profiting from Probation: America's "Offender Funded" Probation Industry 39 (2014) [hereinafter HRW].

6. *See, e.g.*, Carpenter, *supra* note 3; *see also* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 Ohio St. L.J. 1409, 1432 (2001).

conviction.[7] Like fines and fees, forfeitures can be financially devastating as the loss of funds that would otherwise be used to cover basic needs—a vehicle one depends on to get to work or school, or a family home—can have profound consequences for those against whom forfeiture is imposed.

Systems for imposing and collecting fines, fees, and forfeitures are often poorly designed. As a result, in the United States today, 10 million people hold criminal debt from fines and fees totaling over $50 billion,[8] and forfeiture has become a billion-dollar industry based largely on the use of civil asset forfeitures obtained without a criminal conviction.[9] Abuses in both systems have resulted

7. *See* Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 Stan. L. & Pol'y Rev. 293, 297 (2009). In contrast to civil asset forfeitures, there are two types of conviction-based forfeitures. "Criminal forfeitures" are imposed through criminal sentencing as a direct punishment, *see, e.g.*, Alexander v. United States, 509 U.S. 544, 548 (1993); and "civil forfeitures" are obtained through a civil proceeding used to finalize a forfeiture agreed to by a defendant in a plea bargain resolving a related criminal matter or following an adjudication of guilt. *See, e.g.*, Austin v. United States, 509 U.S. 602, 604-05 (1993). For ease of reference, throughout this chapter I use the term "forfeiture" when referring to all three forms of forfeiture, and "civil asset forfeiture" when referring specifically to that practice. An additional distinction in the forfeiture context relates to the items that are forfeited. An "instrumentality" is money or property that is otherwise legal to possess but is used as a means of conducting the alleged criminal activity (e.g., a vehicle used to transport illegal narcotics). "Criminal proceeds" are monies gained from criminal activity and may be "direct" (e.g., money obtained for the sale of narcotics) or "indirect" (e.g., a house purchased with direct proceeds). "Contraband" is a moniker attached to tangible items that are illegal to possess either because they are inherently illegal (e.g., illegal narcotics) or made illegal by the circumstances of the offense (e.g., alcohol transported in violation of state law). This chapter is concerned with the first two categories—instrumentalities and criminal proceeds—as both presume criminal activity has occurred (which may not be proven in the case of civil asset forfeitures) and because the forfeiture of funds, a vehicle, or a home, may have devastating consequences for the defendant and her family, which may raise constitutional issues as noted herein. *See, e.g.*, Pamela Brown, *Parent's House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014).

8. Martin, *supra* note 3, at 5.

9. *See, e.g.*, Michael Sallah et al., *Stop and Seize*, Wash. Post (Sept. 6, 2014) (reporting that between September 2001 and September 2014, the federal Equitable Sharing Program involved seizures valued at over $2.5 billion dollars).

in a surge in efforts by advocates[10] and investigative reporters[11] to document and challenge the real, and often alarming, consequences of relying on criminal justice systems to generate revenue. Fueled by public outcry regarding the use of "modern-day debtors' prisons" in places like Ferguson, Missouri,[12] and jurisdictions around the country,[13] as well as a plethora of incidents in which law enforcement have seized money or property and sought its forfeiture without any meaningful evidence of criminal activity,[14] calls for reform now have support from both conservative and liberal camps.[15]

These systems have also captured the attention of scholars from a variety of fields, including law, sociology, economics, and criminology. In this chapter, I provide a brief examination of two lines of scholarship that explore poorly designed systems involving fines, fees, and forfeitures. The first analyzes the policy implications of the use of criminal justice systems to generate revenue. The second involves explication of constitutional deficiencies that arise in poorly designed systems. This chapter concludes with a series of policy recommendations tied to these lines of scholarship for the reform of the use of fines, fees, and forfeitures.

10. *See, e.g.*, Jessica Feierman et al., Juvenile Law Ctr., Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System (2016); Human Rights Watch, *supra* note 5; Alicia Bannon et al., Brennan Ctr. for Justice, Criminal Justice Debt: A Barrier to Reentry (2010).

11. For examples of investigative reporting related to the use of fines and fees, see Sarah Stillman, *Get Out of Jail, Inc.*, New Yorker (June 23, 2014); Joseph Shapiro, *Supreme Court Rules Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014); Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014). For examples of investigative reporting related to the use of forfeitures, see Robert O'Hara, Jr. & Michael Sallah, *They Fought the Law, Who Won?*, Wash. Post (Sept. 8, 2014); Robert O'Hara, Jr. & Michael Sallah, *Police Intelligence Targets Cash*, Wash. Post (Sept. 7, 2014); Sallah et al., *supra* note 9; Sarah Stillman, *Taken*, New Yorker (Aug. 12, 2013).

12. *See* U.S. Dep't of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 1 (2015) [hereinafter Ferguson Report].

13. *See, e.g.*, Lawyer's Comm. for Civil Rights et al., Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California (2015).

14. *See, e.g.*, Christopher Ingraham, *How Police Took $53,000 from a Christian Rock Band, an Orphanage, and a Church*, Wash. Post (Apr. 25, 2016).

15. *See, e.g.*, Am. Legis. Exchange Council, Resolution on Criminal Justice Fines and Fees (2016) (calling for graduation of economic sanctions to account for ability to pay); ACLU, In for a Penny: The Rise of America's New Debtors' Prisons (2010) (calling for an end to abusive practices related to economic sanctions); Mary Hudetz, *Charles Koch, ACLU Form Unusual Alliance In Pushing States to Overhaul Asset Forfeiture Rules*, U.S. News & World Rep. (Oct. 15, 2015).

I. POLICY IMPLICATIONS

Scholarship regarding the policy implications of inadequately designed systems for imposing and collecting fines, fees, and forfeitures have focused on two key problems. First, increasing evidence suggests that absent meaningful restrictions, the use of such economic sanctions risks distorting the focus of criminal justice incentives both by promoting revenue goals over public safety and interfering with checks and balances that would otherwise help guard against some problematic practices. Second, where fines, fees, and forfeitures are imposed and collected in a manner that contributes to economic and social instability for those who are financially vulnerable, they undermine governmental aims related to reductions in poverty, crime control, mass incarceration, and depletion of government resources. Both sets of issues are addressed below.

A. DISTORTION OF CRIMINAL JUSTICE INCENTIVES

The revenue-generating capacity of fines, fees, and forfeitures risks perverting governmental incentives in two distinct ways. First, by promoting policing and adjudication methods that are most likely to increase revenue, governmental actors may fail to consider, or even implement policies that directly conflict with, public-safety needs. Second, systems that allow law enforcement and prosecutors to retain cash and property seized undermines the checks and balances otherwise afforded through normal budgeting practices.

While there is a debate in the literature regarding whether government officials respond to financial, rather than only political, incentives as a general matter,[16] investigations into specific systems, empirical studies, and anecdotal evidence have linked the use of fines, fees, and forfeitures to practices driven by the goal of revenue generation rather than public safety. For example, the Department of Justice's investigation into the municipal court system in Ferguson, Missouri, uncovered e-mails between city officials and the chief of police in which police staffing decisions were altered to increase money generated from traffic tickets without consideration of the impact such changes would have on traffic safety or community policing efforts.[17] Similarly, an empirical analysis of traffic ticketing in North Carolina from 1990 to 2003

16. *Compare* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144 (2016); *and* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845 (2001); *with* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000).

17. *See* Ferguson Report, *supra* note 12, at 10, 13–14.

found that, "[c]ontrolling for demographic, economic, and enforcement factors … there is a statistically significant increase in the number of traffic tickets issued in the year immediately following a decline in local government revenue,"[18] suggesting that revenue generation, rather than public safety, drove the extent to which traffic laws were enforced.

There is also significant evidence that revenue rather than public safety drives policing decisions related to forfeitures. Eric Blumenson and Eva Nilsen have documented examples of how the thirst for cash has led to shifts in police practices. For example, a traditional drug buy-bust sting operation would involve the use of an undercover officer posing as a person interested in buying illegal drugs; following the exchange, the police would of course seize the drugs and therefore remove them from circulation.[19] With the incentive of forfeiture laws, however, law enforcement has come to rely more heavily on the "reverse sting," under which the police pose as the dealer rather than the buyer, so that upon conclusion of the transaction, they can seize the cash used in the sale.[20] Blumenson and Nilsen also cite to congressional testimony of former New York City Police Commissioner Patrick Murphy, who explained that financial incentives led to a policy whereby police would "impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs."[21] While both reverse stings and forfeitures of cash arguably interrupt the illicit drug trade, the focus on obtaining cash rather than seizing drugs indicates that policing decisions are influenced by the revenue-generating power of forfeiture.

Further, forfeitures may be incentivizing policing of particular offenses where seizures of cash or property are most easily made, which would result in prioritizing the policing of drug crimes over violent offenses, which may in turn exacerbate problematic policing practices that disproportionately affect poor and minority communities.[22] For example, one study testing the effects of allowing police to retain funds and assets seized in drug arrests found that it shifted the focus of police to activities that may produce forfeitures, and, in

18. Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & Econ. 71 (2009).

19. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 67–68 (1998).

20. *Id.*

21. *Id.*; *see also* Benson, *supra* note 7, at 315–16 (describing similar practices in Volusia County, Florida).

22. *See, e.g.*, C.J. Claramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, Reason (June 13, 2017). For a discussion of some of these practices, see Jeffrey Fagan, "Race and the New Policing," in the present Volume.

particular, increased arrests related to drug activity as compared to total arrests by nearly 20%.[23] Further, in cities like Philadelphia and Washington, D.C., it appears that police may be going so far as to seize small amounts of cash—in many cases less than $20—during stop-and-frisk incidents.[24] In other words, pressure to generate revenue may have significant implications for when and how policing occurs that may undermine public safety and intensify public concern regarding police-citizen encounters. The risk is that the focus on revenue generation will interfere with other policy considerations, including public safety.

A separate perversion of criminal justice priorities may occur where law enforcement entities or prosecutors are allowed to keep forfeited cash and property for their agency's own use, as is the case in many jurisdictions.[25] Allowing law enforcement and prosecutors to retain funds removes the check set through budgeting processes, as it provides them the ability to set priorities that may contradict or interfere with crime-control aims of the legislative branch or the public at large.[26] For example, under the federal "Equitable Sharing Program," the federal government "adopts" seizures of cash and property made by local and state law enforcement, thereby pulling the seized assets under federal forfeiture laws, which are at times more expansive than state laws in terms of what may be seized and more restrictive regarding the provision of procedural protections.[27] In exchange, the federal government keeps 10% of the liquidated value of the items seized.[28] This infusion of funds

23. Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub. Choice 284 (2000); *see also* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655, 1696 (2010) (explaining how policing priorities may be designed "to trigger forfeiture laws and to demonstrate a record of productivity that may be used to support applications for sizeable federal grants"); Blumensen & Nielsen, *supra* note 19, at 68–69, 78–79 (describing Department of Justice policies that diverted prosecutorial resources away from other offenses and to crimes where forfeitures are likely in order to increase resources).

24. *See* Robert O'Hara, Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, Wash. Post (Nov. 15, 2014); ACLU, Guilty Property: How Law Enforcement Takes $1 Million in Cash from Innocent Philadelphians Every Year—And Gets Away with It 5 (June 2015).

25. *See* Rachel A. Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. Rev. 870, 954-55 (2015); Benson, *supra* note 7, at 301–02.

26. *See* Nick Sibilla, *Civil Forfeiture Now Requires a Criminal Conviction in Montana and New Mexico*, Forbes (July 2, 2015) (quoting Las Cruces, New Mexico City Attorney Pete Connelly discussing civil asset forfeiture and stating, "We could be czars. We could own the city.").

27. *See* Benson, *supra* note 7, at 303.

28. *Id.* at 302–03 (explaining that at the beginning of the Equitable Sharing Program, the federal government retained 20% of the seizure's value, which was later reduced to 10%).

not only allows law enforcement to sidestep state restrictions on forfeiture, the retention of the profits of forfeiture insulates them from budgeting restrictions that would otherwise establish state and local control over policing overall.[29]

As indicated in the discussion of reforms at the end of this chapter, any concern regarding the way in which fines, fees, and forfeitures may distort criminal justice incentives does not require their elimination. Rather, reforms are needed to create sufficient protections to restrict their use so that criminal justice priorities are properly focused on public safety, rather than revenue generation.

B. UNDERMINING OTHER GOVERNMENTAL AIMS

Separate and distinct from the potential that inadequately designed systems for fines, fees, and forfeitures will distort criminal justice incentives, such systems can also undermine other governmental aims due to their inherently regressive nature. By entrenching or exacerbating the financial vulnerability of people and their families, fines, fees, and forfeitures can create long-term instability and familial disruption, increase criminal justice involvement, aggravate jail overcrowding, and—perhaps ironically—decrease net revenue.

Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable,[30] particularly in low-income communities and communities of color that are most likely to be heavily policed.[31] In the context of fines and fees, many grappling with criminal debt report having to choose between making payments on the debt and meeting basic needs like food, shelter, and hygiene.[32] At the same time, existing criminal debt can make obtaining and maintaining housing and employment difficult for several reasons: it undermines a debtor's credit rating, which may be used by prospective landlords and employers in screening processes;[33] it may prevent debtors from sealing or expunging criminal records;[34] and it can result in the loss of professional or driver's licenses, the latter of which can be particularly harmful for those who live in areas without meaningful access to public

29. Harmon, *supra* note 25; *see also* Benson, *supra* note 7.

30. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions As Misguided Policy*, 10 J. Criminology & Pub. Pol'y 509, 516–17 (2011).

31. *See, e.g.*, John Pawasarat, U. of Wisconsin-Milwaukee Employment & Training Inst., The Drivers License Status of the Voting Age Population in Wisconsin 11, 19 (June 2005); Mathilde Laisne et al., Vera Inst. of Just., Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans 18–19, 22 (2017); *see also* Devon W. Carbado, "Race and the Fourth Amendment," in Volume 2 of the present Report; Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool for Systemic Reform*, 58 Wm. & Mary L. Rev. 1179 (2017).

32. Beckett & Harris, *supra* note 30, at 517; Laisne, *supra* note 31, at 16.

33. Beckett & Harris, *supra* note 30, at 517–18.

34. *See, e.g.*, Feierman, *supra* note 10, at 20.

transportation.[35] The instability with respect to basic needs and the hindrances such debt creates to establishing housing and employment affect not just the debtor, but also her family. For example, the Bureau of Justice Assistance and Council of State Governments have linked the increased use of fines and fees to the inability to pay child support,[36] thereby undermining both the child's economic well-being and the government's interest in child-support enforcement. Further, a debtor unable to make payments on fines and fees may be restricted from public housing benefits, forcing the debtor's family to either separate or lose their housing as well.[37] In other words, unmanageable fines and fees can result in disruption or even disunification of families.

Though it does not result in ongoing debt, the forfeiture of funds or property may also leave people and their families in financially precarious circumstances. With, or more often without,[38] a criminal conviction, people may lose funds they depend upon to meet basic needs,[39] vehicles upon which they depend for transportation to work or school,[40] or the homes in which they live.[41]

A concern expressed by both the United States Supreme Court[42] and commentators,[43] and borne out in research, is that punishments that promote economic instability may result in increased criminal justice involvement. Recent studies, for example, have shown that people may engage in criminal activity for the purpose of paying off unmanageable criminal debt.[44] Additionally, while early studies of the link between fines and fees and recidivism amongst juveniles

35. Pawasarat, *supra* note 31, at 1; *see also* Margy Waller, Brookings Inst., High Costs or High Opportunity Cost? Transportation and Family Economic Success 3 (2005).

36. Rachel L. McLean & Michael D. Thompson, Council of State Gov't Justice Ctr., Repaying Debts 7–8 (2007).

37. *See* Colgan, *supra* note 2, at 293.

38. *See infra* notes 144-146 and accompanying text.

39. *See, e.g.*, Jolene Guiterrez Kruger, *DEA to Traveler: Thanks, I'll Take that Cash*, Albuquerque J. (May 6, 2015) (reporting that after stopping a young man who was traveling to move to Los Angeles, DEA Agents seized his entire life savings; the man stated: "I told [the DEA agents] I had no money and no means to survive in Los Angeles if they took my money. They told me that it was my responsibility to figure out how I was going to do that.").

40. *See, e.g.*, O'Hara & Rich, *supra* note 24 (regarding car seized from mother who had loaned the car to a son who was arrested for a misdemeanor drug charge).

41. *See, e.g.*, Brown, *supra* note 7 (describing the forfeiture of a family home in Philadelphia, Pennsylvania, after police accused the homeowner's son of selling $40 worth of heroin from the home).

42. Bearden v. Georgia, 461 U.S. 660, 671 (1983).

43. McLean & Thompson, *supra* note 36, at 22.

44. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 Am. J. Sociology 1753, 1785–86 (2010); Foster Cook, The Burden of Criminal Justice Debt in Alabama: 2014 Participant Self-Report Survey 11–12 (2014).

showed mixed results,[45] a 2016 empirical analysis of the use of economic sanctions in juvenile court showed that, when controlling for demographic characteristics of court-involved juveniles and crime type, the use of fines and fees as punishment significantly increased the likelihood of recidivism.[46]

Further, studies show that economic, housing, and social stability are critical in reducing recidivism, suggesting that punishments that result in destabilization in these areas will have crime-inducing effects. For example, researchers have found that increased access to employment and ability to earn promotes rehabilitation.[47] If one's employment opportunities are limited due to ongoing criminal debt that makes employers less likely to hire, or because a poverty penalty or collateral consequence[48] limiting one's ability to obtain a professional license or the driver's license one needs to attend job interviews or maintain employment, the rehabilitative potential of employment is lost. A lack of access to housing can exacerbate these issues, as it interferes with employment opportunities,[49] and may exacerbate mental-health and chemical-dependency issues, thereby undermining rehabilitative goals.[50] Even people at high risk for reoffending have a significantly reduced risk of doing so if homelessness can be avoided.[51] In other words, fines, fees, and forfeitures that detract from the ability to pay housing costs, policies that push those who cannot pay economic sanctions out of public housing, or the forfeiture of a home, all risk placing people in situations in which the likelihood of recidivism is heightened. In contrast, researchers have linked pro-social activities, including the promotion

45. *See, e.g.*, Anne L. Scheider, *Restitution and Recidivism Rates of Juvenile Offenders: Results from Four Experimental Studies*, 24 Criminology 533 (1986) (finding that only two of four studies indicated a reduction in recidivism where juveniles were sentenced to restitution as compared to incarceration or probation).

46. Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, Youth Violence & Just. (Sept. 2016).

47. *See, e.g.*, Jeffrey Grogger, *Certainty v. Severity of Punishment*, 29 Econ. Inquiry 297, 305 (1991).

48. *See* Gabriel J. Chin, "Collateral Consequences," in the present Volume.

49. *See, e.g.*, Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. Offender Rehabilitation 147 (2004); Caterina Gouvis Roman & Jeremy Travis, Urban Inst., Taking Stock: Housing, Homelessness, and Prisoner Reentry (2004).

50. *See, e.g.*, Jocelyn Fontaine & Jennifer Biess, Urban Inst., Housing as a Platform for Formerly Incarcerated Persons 7–8 (2012) (summarizing literature on supportive housing programs).

51. Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 Crim. Just. & Behav. 471 (2013) (showing that homelessness significantly increased risk of recidivism among high risk offenders).

of familial ties, to reductions in recidivism.[52] But, as noted above, the loss of housing and employment as a result of fines, fees, or forfeitures can interrupt the family unit, for example, by forcing families to separate in order to maintain housing benefits for some family members. In short, separately and collectively, these practices undermine the governmental interest in reducing recidivism by making ongoing criminal justice involvement more likely.

Whether due to increased recidivism or the use of incarceration as a penalty for the failure to pay, fines and fees also exacerbate the effects of mass incarceration in many jurisdictions, particularly with respect to the overcrowding of local and county jails. While it is difficult to know how many people are incarcerated at any given time in relation to criminal debt because that data is rarely tracked, available information indicates that in many places, debtors account for nearly a quarter of jail populations,[53] and that those numbers may be significantly higher in some jurisdictions.[54] This can at times lead to the misuse of jail facilities, such as in Rutherford County, Tennessee, in which the incarceration of people for the failure to make payments to a private probation company contracted to collect criminal debt resulted in the jail holding three people in cells designed to hold one person only,[55] creating a risk of litigation related to unconstitutional jail conditions.[56]

Systems in which courts impose economic sanctions on people with no meaningful ability to pay also may result in wasted government resources, whereby good money is effectively thrown after bad. For example, where people cannot pay off fines and fees immediately, courts often require that they return to court periodically to show that they are unable to pay, clogging the docket with hearings and taking valuable judicial and administrative time.[57] The use of poverty

52. *See, e.g.*, Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 Just. Q. 382 (2011) (noting consistency through scholarly literature that recidivism rates decrease for people who maintain familial ties and finding that familial ties also improve the likelihood of employment); *see also* Graffam, *supra* note 49.

53. *See, e.g.*, Randal Seyler, *Local ACLU Chapter Seeks Jail Oversight Committee*, Silver City Sun-News (July 6, 2015) (reporting that a quarter of all jail inmates in Grant County, New Mexico, are incarcerated for a failure to pay fines and fees).

54. *See generally* Ferguson Report, *supra* note 12.

55. *See* Ben Hall, *Sheriff Calls Rutherford County's Probation System a "Rat Wheel,"* NewsChannel 5 Network (Jan. 17, 2016), http://www.newschannel5.com/news/newschannel-5-investigates/sheriff-calls-rutherford-countys-probation-system-a-rat-wheel.

56. *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2013); Sharon Dolovich, "Prison Conditions," in the present Volume.

57. *See, e.g.*, Christian Henrichson et al., The Costs and Consequences of Bail, Fines and Fees in New Orleans: Technical Report 29–34 (2017).

penalties can also create unnecessary expense. A recent study conducted by the Vera Institute of Justice in New Orleans, Louisiana, showed that, even setting aside the costs of employing court and administrative staff and law enforcement to engage in collections, its use of incarceration to address the inability to pay bail, fines, and fees created a $1.9 million annual deficit.[58]

In sum, both existing research and an ever-increasing pool of anecdotal evidence suggest that imposing and collecting fines, fees, and forfeitures can undercut important governmental aims by increasing the precarious financial condition of its most vulnerable constituents, increasing crime rates, contributing to jail overcrowding, and depleting government funds. Again, this is not to say that fines, fees, and forfeitures cannot be used in a manner that promotes positive outcomes; but significant reforms such as those set forth at the end of this chapter are necessary to avoid the negative consequences that may easily stem from poorly designed systems.

II. CONSTITUTIONAL IMPLICATIONS OF POLICING FOR PROFIT

Constitutional scholars have identified myriad ways in which inadequately designed systems involving fines, fees, and forfeitures are constitutionally deficient.[59] Lawmakers should take heed not only because crafting a constitutional system is normatively desirable, but also because litigation of these issues is

58. Laisne, *supra* note 31, at 22–24; *see, e.g.*, Scott Dolan, *Taxpayers Lose as Maine Counties Jail Indigents Over Unpaid Fines*, Portland Press Herald (May 31, 2015) (reporting that in Cumberland County, Maine, where the cost of jailing "13 individuals for a combined total of 232 days was $25,990—to recoup $10,489 in fines or restitution"). For a discussion of pretrial detention and bail, see Megan Stevenson & Sandra G. Mayson, "Pretrial Detention and Bail," in Volume 3 of the present Report.

59. The scholarly literature focuses primarily on the constitutionality or lack thereof under the United States Constitution, as I do here. There may, however, be further constitutional limitations to the use of fines, fees, and forfeitures under state constitutions. *See generally* Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harv. L. Rev. 1024 (2016).

increasingly likely due to a recent boom in class-action lawsuits successfully challenging practices related to fines and fees,[60] and the Supreme Court's willingness to strike down forfeitures that offend constitutional bounds.[61]

A. EXCESSIVE-FINES CLAUSE AND THE CONSTITUTIONAL IMPORTANCE OF FINANCIAL EFFECT

Along with excessive bail and cruel and unusual punishment, the Eighth Amendment to the United States Constitution prohibits the imposition of "excessive fines."[62] In addition to determining that the Excessive Fines Clause applies not just to fines per se, but to financial penalties that are at least partially punitive (including forfeitures),[63] the Supreme Court has held that a determination of constitutional excessiveness requires application of a gross disproportionality test in which the seriousness of the offense is weighed against the severity of the punishment.[64] Because the Court has addressed the Excessive Fines Clause's meaning on only four occasions,[65] however, there are several issues regarding the Clause's scope that remain ripe for development, including the question of whether consideration of a defendant's ability to pay is relevant to assessing punishment severity. Legal scholarship to date has focused primarily on two aspects of Eighth Amendment doctrine to assess that open question: the Supreme Court's use of an originalist (historical) method of interpretation, as well as the underlying principles that inform its proportionality jurisprudence. Both approaches shed light on why the Court is likely to determine that the financial effect of fines, fees, or forfeitures on a defendant is relevant to whether it is excessive in violation of the Eighth Amendment.

60. *See, e.g.*, Robert Patrick, *Judge Approves $4.7 Million Settlement to Those Jailed for Unpaid Fines in Jennings*, St. Louis Post-Dispatch (Dec. 14, 2016).

61. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321 (1998). In March 2017, Justice Clarence Thomas effectively invited additional litigation regarding the constitutionality of civil asset forfeiture. *See* Leonard v. Texas, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting denial of certiorari) (noting the importance of the claim but also that petitioner's claim was untimely). The Supreme Court's willingness to cabin forfeiture practices is also seen in a unanimous 2017 decision strictly construing a federal forfeiture statute to preclude joint and several liability. *See* Honeycutt v. United States, 137 S. Ct. 1626 (2017).

62. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

63. Austin v. United States, 509 U.S. 602, 604–05 (1993); Alexander v. United States, 509 U.S. 544, 548 (1993).

64. *Bajakajian*, 524 U.S. at 334.

65. *See* Colgan, *supra* note 2, at 281.

The Supreme Court has engaged in an originalist analysis in an attempt to assess what would have rendered a fine "excessive" at the time of the Eighth Amendment's ratification in 1791. In doing so, the Court pointed to a provision of Magna Carta, an English charter devised in the 13th century that influenced the English Bill of Rights and, in turn, the American Bill of Rights.[66] The provision allowed the imposition of amercements (a predecessor to the modern fine), but explicitly prohibited penalties that would impoverish a defendant by impeding his ability to secure a livelihood, thereby necessitating an analysis of the defendant's financial circumstances.[67] The Court ultimately did not decide whether the Excessive Fines Clause mandated a similar analysis because the defendant's ability to absorb the forfeiture at issue was not raised in the case,[68] but scholarship assessing the historical use of economic punishments would support answering that question in the affirmative.

Both analyses of colonial and early American statutes and court records leading up to the ratification of the Eighth Amendment[69] and the English experience with fines and the adoption of the English Bill of Rights[70] strongly support a broad interpretation of excessiveness that would include consideration of financial effect on the defendant. In particular, while the protection of one's livelihood in Magna Carta was at times inconsistently applied in the early American experience, a consciousness of the need to avoid the risk that economic sanctions may impoverish is visible in the historical record, including in statutes that explicitly referenced Magna Carta or that required consideration of financial effect.[71]

As with the historical vantage, assessing the use of practices related to fines, fees, and forfeitures in light of the Court's proportionality precedence also supports a conclusion that the financial effect of fines, fees, and forfeitures is relevant to the question of excessiveness.[72] The Supreme Court borrowed the gross disproportionality test for assessing whether an economic sanction is "excessive," from its jurisprudence regarding the Cruel and Unusual

66. *See Bajakajian*, 524 U.S. 335–36; Colgan, *supra* note 2, at 320.
67. *See* Colgan, *supra* note 2, at 320–21.
68. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern "Debtors' Prison,"* 65 UCLA L. Rev. (forthcoming 2018).
69. *See* Colgan, *supra* note 2, at 320–21.
70. *See id.* at 321–22; Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833 (2013); Robert B. Durham, *The Cruel and Unusual Punishments and Excessive Fines Clauses*, 26 Am. Crim. L. Rev. 1617 (1989).
71. *See* Colgan, *supra* note 2, at 330–35.
72. *See* Colgan, *supra* note 68.

Punishments Clause.[73] In that arena, the Court has repeatedly returned to several key principles.

One such principle is the importance of equality in sentencing, in which two people who are equally culpable for the same offense should receive equal punishment.[74] Yet, when applied to people who have no meaningful ability to pay, poverty penalties that impose additional sanctions such as interest, collections fees, probation, or incarceration for the failure to pay effectively sanction a person's poverty rather than her culpability for the underlying offense. Even setting aside poverty penalties, the principle of equality is undermined by the inherently regressive nature of fines, fees, and forfeitures.[75] If two people—equally culpable for the same offense—receive an identical fine, and that fine creates little to no financial hardship for one person but places the other at risk of being unable to meet basic needs or results in ongoing instability, the disparate severity of the punishment suggests that equally culpable defendants are not, in fact, being treated equally.

Another principle involves the importance of comparative proportionality of sentencing, in which a less serious offense should receive a lower sentence than a more serious offense.[76] Yet, particularly for people who are subject to long-term, and perhaps perpetual, criminal debt, the seriousness of the offense is rendered effectively irrelevant; whether that debt stems from a traffic offense or a burglary, the need to make continual payments against the outstanding debt is the same, and the distinction between offenses is undermined.

The Court has also taken into account the expressive function of punishment in its proportionality jurisprudence.[77] There are at least two ways in which the use of poverty penalties and the imposition of unmanageable debt are problematic in this regard. First, for people who are subject to such sanctions, the message expressed can often be that the justice system prizes revenue

73. *See Bajakajian*, 524 U.S. 321.

74. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 292-93 (1983).

75. Even though there is significant disagreement among scholars as to whether subjective experience is relevant to the validity of sentences involving incarceration, the very same scholars agree that the failure to account for financial effect in the context of economic sanctions improperly prizes formal equality over substantive equality. *See, e.g.*, Adam J. Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182, 190–92, 226 (2009) (arguing that both the subjective experience of incarceration and financial sanctions are relevant to whether punishment is justified under retributive principles); Kenneth W. Simmons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 Colum. L. Rev. Sidebar 1, 4–5, 6 n.11 (2009) (rejecting the consideration of subjective experience of incarceration but embracing the subjective experience of financial sanctions).

76. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 442 (2008).

77. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 72 (2010).

generation over fairness. Second, by subjecting people to punishment triggered by their inability to pay rather than the nature of the underlying offense, it creates a punishment that is more severe than the degree of the public's desire to condemn the underlying offense, something evident by the increasing, and bipartisan, public support for reform.

An additional concern in the Court's proportionality jurisprudence involves the potential crime-inducing effects and related social harms that can be created by the imposition of excessive punishments.[78] As detailed above, the imposition of fines, fees, and forfeitures that a person has no meaningful ability to pay or that destabilize one's employment, housing, and familial ties, not only fails to deter crime but can instead push people into criminal activity, with exacerbation of mass incarceration and wasteful government spending in tow. It is also linked to a laundry list of ills, such as barriers to employment, increases in housing instability and homelessness, decreases in child-support payments, and promotion of family disunification.

Finally, the Supreme Court has recognized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"[79] and therefore upholding the dignity of a defendant is central to the idea of whether a punishment is constitutionally viable or, instead, excessive.[80] Poorly designed systems for imposing and collecting fines, fees, and forfeitures miss this mark. Such systems place those with limited means in the position of having to choose between basic necessities like food, shelter, and hygiene on the one hand and paying unmanageable debt on the other. In some jurisdictions, those who cannot pay are disenfranchised from the vote, thus blocking them from participating in the democratic community. And in many cases, people are kept forever in the shadow of the criminal system by criminal debts that are effectively perpetual. As a result, the dignity and autonomy of those subjected to economic sanctions they cannot pay is undermined and ignored, offending the Eighth Amendment's dignity constraint.[81]

78. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 284 (1980).

79. Trop v. Dulles, 356 U.S. 86, 99–100 (1958) (plurality opinion).

80. *See* Gregg v. Georgia, 458 U.S. 153, 173 (1976) (plurality opinion) (explaining that the Eighth Amendment's dignity constraint "means, at least, that the punishment not be 'excessive'"); *see also* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. Ill. L. Rev. 2129.

81. *See* Colgan, *supra* note 68.

B. DUE PROCESS CLAUSE AND THE PROHIBITION ON PRIZING REVENUE GENERATION OVER FAIRNESS

For nearly a century, the Supreme Court has consistently ruled that the Due Process Clause is violated by placing governmental actors with adjudicative authority over whether economic sanctions are assessed in a position where fairness may be overcome by a desire to generate revenue for the government or for personal gain.[82] Yet many jurisdictions have designed systems involving fines, fees, and forfeitures that directly violate this long-standing doctrine.[83]

To establish governmental self-dealing, the Court has looked at whether a jurisdiction relies heavily on punishments with revenue-generating capacity to offset the need for taxation or to stabilize and maintain the jurisdiction's finances.[84] Another signal that a system has run afoul of due process exists where governmental actors with responsibility for generating funds are given decision-making authority over the assessment of such a punishment.[85] The Court has also looked to the volume of cases on a trial court's docket through which funds may accrue for signals that the system is driven by a desire to generate revenue.[86] Yet evidence is mounting that jurisdictions across the country are using economic sanctions imposed against both adults and juveniles for the purpose of avoiding the need to increase taxes to fund not just criminal justice-related services, but a wide variety of governmental services such as infrastructure projects, educational services, and more.[87] National Public Radio and the National Center for State Courts found that, in recent years, "48 states have increased criminal and civil court fees, added new ones, or both."[88] Further, in an increasing number of jurisdictions, judges responsible for imposing fines and fees report feeling pressured to do so in

82. *See* Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

83. *See, e.g.*, Colgan, *supra* note 31, at Part I.A.1.

84. *See Ward*, 409 U.S. at 58; *Tumey*, 273 U.S. at 533.

85. *See Tumey*, 273 U.S. at 533–34 (describing mayor's dual role as judicial officer and county executive); *Ward*, 409 U.S. at 39 (describing mayor's control over police chief's determination to file charges).

86. *See Ward*, 409 U.S. at 58 (citing police chief's testimony that the mayor ordered him to charge violations in the municipal, rather than county, court whenever possible so that the village could retain economic sanctions imposed); *Tumey*, 273 U.S. at 520 (describing mayor's statement that the town's liquor court would only operate when the town is short on funds).

87. *See, e.g.*, M. Scott Carter & Cilfton Adcock, *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, Oklahoma Watch (Jan. 31, 2015).

88. Shapiro, *Court Fees Rise*, *supra* note 11.

order to generate revenue.[89] And, as noted above, ticketing and court dockets in some jurisdictions rise in response to fiscal downturns, evidencing the aim of revenue generation.[90]

Further, while the cases regarding governmental self-dealing to reach the Court to date have involved fines and fees rather than forfeitures, the vast scope of forfeiture practices implicate similar due process concerns.[91] Forfeiture in general, and civil asset forfeiture in particular, has come to be regarded by law enforcement in many jurisdictions as a "tax-liberating gold mine."[92] Further, processes for opposing civil asset forfeiture are so complex and expensive that such forfeitures are rarely challenged,[93] meaning that the law enforcement officer seizing the cash or property effectively becomes the adjudicative actor, and one whose agency is often directly benefited by the funds seized. Finally, the volume of civil asset forfeitures in particular indicates that seizures are driven at least in part by a desire to generate revenue. Between September 2001 and September 2014, law enforcement made nearly 62,000 seizures under the federal Equitable Sharing program alone, over 80% of which were handled as civil asset forfeitures and therefore did not involve a criminal indictment, let alone a conviction.[94] Those seizures valued over $2.5 billion, of which "[s]tate and local authorities kept more than $1.7 billion."[95] As with fines and fees, the failure to design forfeiture practices to ensure that revenue generation is not a primary motivator leaves open the risk that the drive for revenue generation will overwhelm the need for fairness in violation of due process.

89. *See, e.g.*, Sydney Brownstone, *Leaked E-mail: What a King County Superior Court Judge Really Thinks About Raising the Cost of Traffic Ticket Fines*, The Stranger (May 21, 2015).

90. *See* Garrett & Wagner, *supra* note 18; *see also* Colgan, *supra* note 31, at Part I.A.

91. There is a debate in the literature on the application of the Due Process Clause to forfeiture as to whether modern forfeiture practices, and particularly civil asset forfeitures, are or are not consistent with the historical use of forfeiture as punishment. *Compare* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446 (2016) (arguing that three features of civil forfeiture proceedings—that they proceed *in rem*, that people must file timely claims, and that claimants do not have full constitutional protections—are consistent with early American forfeiture practices); *with* Donald J. Bourdeaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition*, 61 Mo. L. Rev. 593 (1996) (critiquing the Court's originalist interpretation of early American forfeitures as inconsistent with historical practice). Regardless of the answer to that query, the use of forfeiture in a manner that prizes revenue generation over fairness is inconsistent with the Court's concern regarding self-dealing.

92. Sallah, *supra* note 9 (quoting Illinois Deputy Ron Hain).

93. O'Hara & Sallah, *They Fought the Law*, *supra* note 11.

94. Robert O'Hara, Jr. & Steven Rich, *Asset Seizures Fuel Police Spending*, Wash. Post (Oct. 11, 2014).

95. *Id.*

C. EQUAL PROTECTION AND DUE PROCESS CLAUSE RESTRICTIONS RELATED TO COLLECTIONS

The Equal Protection and Due Process Clauses prohibit the automatic conversion of unpaid economic sanctions into incarceration, which implicates practices in many jurisdictions that use incarceration as a penalty for the failure to pay. The Court first addressed an equal protection challenge to the use of fines and fees in *Williams v. Illinois*[96] in 1970 and again in *Tate v. Short*[97] in 1971. In both cases, the Court held that the use of incarceration as a substitute punishment for fines and fees where the defendant had no ability to pay violated the Fourteenth Amendment because the choice to satisfy the sanctions and avoid incarceration was nonexistent for indigent defendants.[98] Just over a decade later, in *Bearden v. Georgia*, the Court examined the revocation of probation for the failure to pay statutory fines and restitution.[99] Relying on both the Equal Protection and Due Process Clauses together, the Court held that where payment of economic sanctions is a condition of probation, a court may not revoke probation without considering whether the failure to pay was willful or due instead to an inability to pay despite bona fide efforts.[100]

While the *Bearden* Court did leave open the possibility of revoking probation and imposing a term of confinement even where a defendant lacked funds despite bona fide attempts to obtain the means to pay, it held that incarceration could be available only where no alternative form of punishment could satisfy the state's punishment goals.[101] It then systematically dismantled the state of Georgia's arguments that imposing a punishment triggered by an inability to pay satisfied its punitive aims. The Court explained that the governmental interest in punishment is fully satisfied by the use of economic sanctions within the defendant's means because such sanctions create a "pinch on the purse" in response to the defendant's culpability,[102] and that the decision to employ an economic sanction in the first instance meant the state had disclaimed its

96. Williams v. Illinois, 399 U.S. 235 (1970).
97. Tate v. Short, 401 U.S. 395 (1971).
98. *See Tate*, 401 U.S. at 396-98; *Williams*, 399 U.S. at 236-37, 244–45.
99. Bearden v. Georgia, 461 U.S. 660 (1983).
100. *Id.* at 672.
101. *Id.* at 672–73.
102. *Id.* at 671–72.

interest in incapacitation.[103] The Court then emphasized the potential breadth of non-incarcerative alternative sanctions that lawmakers could devise to ensure that poverty does not trigger enhanced punishment.[104]

There is limited scholarly literature examining these claims, undoubtedly because the Court's restrictions on the use of incarceration as a poverty penalty have been so clear. As a result, recent scholarship related to these limitations has focused on documenting the failure of states and municipalities to adhere to the *Williams-Tate-Bearden* line, and pressing for compliance with its dictates.[105] In addition, a boom in litigation has forced several jurisdictions into compliance, at times in conjunction with significant financial penalties.[106]

D. THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

There are two key questions in the context of the right to counsel related to the use of fines, fees, and forfeitures: first, whether either the Sixth Amendment or the Due Process Clause affords a constitutional right to counsel in the type of systems for imposing and collecting economic sanctions in use today; and second, whether systems for collecting and distributing fees for the use of indigent defense counsel pass constitutional muster.

The Supreme Court has recognized a right to counsel under both the Sixth Amendment[107] and the Due Process Clause,[108] but it is an open question as to whether those rights extend to protect people who are, at least as an initial matter, subject to fines, fees, and forfeitures. In *Scott v. Illinois*, the Court declined to extend the Sixth Amendment right to counsel to cases in which only financial penalties, and not incarceration, are on the line.[109] Yet, in *Alabama v. Shelton*, the Court left open the question of whether a Sixth Amendment right to counsel exists where a jurisdiction imposes fines and fees at sentencing for which the failure to pay triggers incarceration even without a formal suspended

103. *Id.* at 667. For a discussion of incapacitation, see Shawn D. Bushway, "Incapacitation," in the present Volume.
104. *Bearden*, 461 U.S. at 672–73.
105. *See, e.g.*, Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md. L. Rev. 486 (2016); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 Minn. L. Rev. 1837 (2015).
106. *See, e.g.*, Patrick, *supra* note 60.
107. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
108. *See* Powell v. Alabama, 287 U.S. 45 (1932).
109. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

sentence,[110] leaving a gray area in jurisdictions that use poverty penalties such as incarceration for failure to pay.

But even setting aside that open question, there is reason to believe that the *Scott* limitation is ripe for review. Not only might the *Scott* Court's understanding of the relative severity between financial penalties and incarceration be anachronistic,[111] the decision also suffers from a failure to consider whether cases for which financial sanctions are imposed raise difficult factual or constitutional questions necessitating the need for counsel to ensure that the outcome of the trial is reliable.[112] Yet cases resulting in the imposition of fines, fees, and forfeitures may be riddled with factual and constitutional issues which lay people are ill-suited to raise,[113] suggesting that *Scott* was wrongly decided.

In addition to the Sixth Amendment right to counsel, the Supreme Court has signaled that there may be a due process right to counsel in hearings related to the collection of economic sanctions. In a 2011 case involving the right to counsel in child-support hearings, *Turner v. Rogers*, the Court noted in an aside that it may recognize a due process right to counsel in hearings involving the collection of debt owed to the government, particularly where either the government is represented by counsel or where the proceeding does not provide procedural safeguards such as "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings."[114] Collections practices in many jurisdictions fall directly within this mold.

110. Alabama v. Shelton, 535 U.S. 654 (2002). The *Shelton* Court declined to address the question of whether counsel is required where a court imposes "pay-only-probation." *See id.* at 672–73. In pay-only probation systems, probation is used exclusively as a collections mechanism, and is not attached to a suspended term of incarceration, but incarceration may occur as a response to a failure to pay. *See* Human Rights Watch, *supra* note 5, at 25–26. Though novel at the time the Court handed down its opinion, *see Shelton*, 535 U.S. at 673, in subsequent years pay-only probation has been on the rise, *see* Human Rights Watch, *supra* note 5, at 39. Other jurisdictions use arrest warrants, rather than probation orders, to the same effect. *See, e.g.*, Colgan, *supra* note 31, at Part I.A.

111. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 Harv. C.R.-C.L. L. Rev. 1 (2013) (arguing that the actual incarceration line no longer comports with the realities of misdemeanor punishment, particularly due to the imposition of collateral consequences).

112. *Compare Scott*, 440 U.S. at 373–74; *with Shelton*, 535 U.S. at 666; *and* Argersinger v. Hamlin, 407 U.S. 25, 35 (1972).

113. *See* Colgan, *supra* note 31, at Part I; *see also Argersinger*, 407 U.S. at 33 (noting that petty offenses "often bristle with thorny constitutional questions").

114. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011); *see also* Colson v. Joyce, 646 F. Supp. 102 (D. Me. 1986) (determining that due process mandated right to counsel at failure to pay hearings because counsel would "appreciably decrease the risk of an erroneous decision").

Of course, the Catch-22 of a denial of the right to counsel to assist with one's legal claims is that the enforcement mechanism for the right is to bring a legal claim. But because defendants for whom the claim is relevant are necessarily without counsel, litigation pushing the Court to rethink and extend the right to counsel has been limited. Since the *Turner* decision was announced in 2011, for example, it appears that no lower appellate courts have considered whether *Turner* should be interpreted to allow for a right to counsel in criminal debt-collection hearings, and that the only adjudication of the issue at the trial level has arisen in two cases resolved through a joint settlement agreement involving the city of Montgomery, Alabama, and a pending class-action suit against Ferguson, Missouri.[115] Therefore, despite the promise of the rule, it remains under-theorized.

The second issue with respect to access to counsel involves systems in which access to counsel is provided, but defendants—who qualify for defense services only because they are indigent—are charged fees for their representation. While the Court has upheld the ability of jurisdictions to recoup indigent-defense expenses as a general matter,[116] practices in many jurisdictions raise a host of constitutional concerns. First, the imposition of poverty penalties against an indigent defendant unable to pay indigent-defense fees arguably violates *Gideon v. Wainwright* because it effectively punishes indigent defendants for the very quality that triggers the availability of the right.[117] Second, indigent-defense fees and the threat of poverty penalties may result in the unconstitutional chilling of the Sixth Amendment right to counsel by incentivizing defendants to waive the right when they otherwise would not have.[118] Third, the distribution of indigent-defense fees (as well as other forms of economic sanctions) to indigent-defense counsel creates a system by which

115. In order to assess the extent to which the *Turner* claim is being developed in the lower courts, I reviewed each case citing *Turner* as identified by Westlaw as of February 1, 2017. Of the 189 cases identified, none involved the assessment of *Turner*'s dicta regarding debt collection proceedings where the debt was owed to the state. For trial level cases, see Mitchell v. City of Montgomery, 2014 WL 11099432 at *5 (M.D. Al. Nov. 17, 2014); Cleveland v. City of Montgomery, 2014 WL 6461900 at *5 (M.D. Al. Nov. 17, 2014); Fant v. City of Ferguson, 107 F. Supp. 3d 1016, 1033–34 (E.D. Mo. 2015). Though the compilation of cases may not capture every trial or appellate court considering the issue, the low number of cases identified gives a reasonable sense of how infrequently the question is being addressed in the lower courts.

116. *See* Fuller v. Oregon, 417 U.S. 40, 47–48 (1974) (upholding a fee recoupment statute because it provided protections for those unable to pay including a hearing to determine the defendant's means and the effect of the sanction and the authority for the court to wave fees).

117. *See* Beth A. Colgan, *Paying for* Gideon, 99 Iowa L. Rev. 1929 (2014).

118. *See, e.g.*, Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. Mich. J. L. Reform 323, 357–69 (2009).

defense counsel are financially dependent upon conviction and imposition of punishment against their own clients.[119] This may allow the reversal of criminal convictions for ineffective assistance of counsel due to the conflicts of interest created by such systems.[120]

RECOMMENDATIONS

As the manner in which governments employ fines, fees, and forfeitures for punishment has continued to unfold, attention to the reform of such systems has increased. For example, a 2016 report from the Criminal Justice Policy Program at Harvard Law School[121] and a 2017 joint report from the Harvard Kennedy School of Government and the Bureau of Justice Assistance[122] provide numerous policy recommendations to transform the use of fines and fees to avoid the policy and constitutional problems described herein. The following non-exhaustive list of recommendations is intended to complement those efforts by highlighting reforms to the use of fines and fees, as well as forfeitures, that are directly related to the scholarly literature detailed in this chapter's previous sections. While the implications for government budgeting are necessarily dependent on the unique circumstances of a given jurisdiction, each proposal contains a brief indication as to whether it is likely to be revenue-enhancing, revenue-neutral, or would entail additional expenditures of government resources.

1. **Eliminate poverty penalties and other policies that negatively impact ability to pay.** A deep irony of many systems involving fines, fees, and forfeitures is that the governmental interest in obtaining full payment is undermined by public policies that make it more likely that people will have no meaningful ability to pay. As detailed above, poverty penalties make it more difficult for people to obtain and maintain housing and employment and to remain connected to family, each of which in turn contributes to an inability to pay economic sanctions. Further, any number of other direct and collateral consequences of conviction can reduce the capacity to pay.[123] For example, certain convictions—particularly related to drug offenses—result in exclusion from public housing or obtaining

119. *See, e.g.*, Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 Wm. & Mary L. Rev. 2045, 2055–68 (2006); ACLU, *supra* note 15, at 26–27.

120. *See, e.g.*, Anderson, *supra* note 118, at 368-69.

121. *See* Confronting Criminal Justice Debt, *supra* note 5.

122. *See* Martin, *supra* note 3.

123. *See* Chin, *supra* note 48.

occupational licenses,[124] ultimately making it less likely a person will be able to satisfy fines and fees or recover from forfeiture. Lawmakers would be well-served to eliminate poverty penalties altogether, and also to study the ways in which direct and collateral consequences undermine the viability of using economic sanctions as a means of punishment.[125]

The elimination of certain poverty penalties, such as incarceration or probation, is likely to be revenue-enhancing as the costs associated with such penalties often outweigh funds collected.[126] Eliminating others—such as interest, collections costs, and other fees—may result in the loss of some revenue, though it is likely in many jurisdictions that the change will be revenue-neutral. Though such penalties are intended to recoup costs to the government for collections-related practices, it is unclear whether administrative expenditures are really recouped both because chasing after debt requires the expenditure of resources and because the added debt may make it less likely that debtors pay economic sanctions.[127]

2. **Create systems for meaningful consideration of financial effect.** As detailed above, the failure to account for the financial effect of fines, fees, and forfeitures places people who are financially vulnerable in precarious straits, and in so doing undermines governmental interests related to its constituents' economic and social stability, crime reduction, administration of jails, and efficient government spending. Further, not attending to the financial effect of such punishments may violate the Excessive Fines Clause of the Eighth Amendment on the front end and risks significant Equal Protection and Due Process Clause problems during collections.

   In a forthcoming work, I examine a largely forgotten period in the late 1980s and early 1990s, in which a handful of jurisdictions around the country experimented with a model for graduating economic sanctions according to ability to pay known as the "day-fine."[128] Day-fines involve a two-step process in which a penalty unit is assessed based on offense seriousness, and then that unit is multiplied by the defendant's adjusted

124. *See, e.g.*, Mo. Rev. Stat. 328.150 (prohibition on obtaining a barber's license); *see also* Colgan, *supra* note 117, at 1933–34 (detailing exclusion from public housing and various forms of employment including truck driving and agriculture).

125. *See also* Alexandra Natapoff, "Misdemeanors," in Volume 1 of the present Report.

126. *See supra* note 58 and accompanying text.

127. *See* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 Iowa L. Rev. (forthcoming 2017) (documenting increases in collections of fines and fees where economic sanctions were graduated to be within the defendant's capacity to pay).

128. *See id.*

daily income, resulting in the economic sanction to be imposed. While the day-fines experiments suffered from some design flaws,[129] they show that a well-designed system for graduating economic sanctions is fully consistent with the efficient administration of the courts and may even result in improved revenue generation due to increased payments, as well as a decrease of expenditures related to collections, supervision, and incarceration.[130] In other words, attending to a defendant's ability to pay fines, fees, and forfeitures has the potential to not only be fairer, but also to be revenue-enhancing.

3. **Develop non-incarcerative alternative sanctions.** Even with the use of graduated economic sanctions, there will be some subset of defendants who are destitute,[131] and therefore effectively unable to pay economic sanctions of any kind. Rethinking the use of fines, fees, and forfeitures provides an opportunity to consider alternative forms of punishment.[132] In devising alternatives, lawmakers should take care to ensure that the alternatives are not disproportionate to the underlying offense (in particular by prohibiting the use of incarceration as a substitute for economic sanctions), and that alternatives are designed to avoid unintended consequences that undermine other societal interests. For example, while community service is often offered as a substitution for the use of economic sanctions (albeit one that is unworkable for people who are unable to participate due to

129. *See* Michael Tonry, "Community Punishments," in the present Volume.

130. *See* Colgan, *supra* note 127; *see also* Susan Turner & Joan Petersilia, RAND Corp., Day Fines in Four U.S. Jurisdictions 6 (1996); Douglas C. McDonald et al., Nat'l Inst. of Just., Day Fines in American Courts: The Staten Island and Milwaukee Experiments 6 (1992). The graduation of economic sanctions will, in some subset of cases, implicate restitution. As the Court has recognized, imposing restitution on a defendant who has no meaningful ability to pay it does not "suddenly make restitution forthcoming," Bearden v. Georgia, 461 U.S. 660 (1983), and the unfortunate but unsurprising reality is that a significant portion of restitution remains unpaid, *see* McLean and Thompson, *supra* note 36, at 7. A pre-existing mechanism may help reach the goal of graduating economic sanctions—including restitution—while also making crime victims whole. Each state has a restitution fund as part of the federal Crime Victims Compensation program, which consists of a mix of federal dollars and, in many states, a portion of fines and surcharges collected. *See State Links*, Nat'l Assoc. of Crime Victim Compensation Boards, http://www.nacvcb.org/index.asp?sid=6 (last visited June 15, 2017). With some adjustments, those restitution funds could be used to pay victims immediately for direct losses. This would mean lawmakers may need to distribute a higher portion of amounts collected from statutory fines and surcharges toward the restitution fund, prizing restitution over the myriad other purposes for which statutory fines and fees are applied.

131. A recent study shows that 1.5 million households in the United States live on cash incomes of $2.00 or less per day. Kathryn J. Edin & H. Luke Shaefer, $2.00 a Day: Living on Almost Nothing in America (2016).

132. *See* Tonry, *supra* note 129.

issues such as disability or child care), it may have negative consequences for local labor markets or fail to adequately protect those sentenced to perform labor,[133] and therefore should be carefully constructed to avoid such pitfalls.

In the short-term, the development of non-incarcerative alternative sanctions will require additional governmental expenditures. There is strong evidence, however, to believe that in the long term, such expenditures could prove to have significant financial benefits. A meta-analysis conducted by the Washington State Institute for Public Policy (WSIPP), a nonpartisan research center created by the Washington Legislature, involved the measurement of the benefit-to-cost ratio created by reduced recidivism and criminal justice involvement of various programs, many of which could be the basis of promising alternative sanctions. For example, for every dollar spent, the benefit-to-cost ratio for employment training and job assistance in the community was $18.17, for day reporting centers was $5.71, and restorative justice conferencing was $3.49, to name a few.[134] Therefore, while developing alternative sanctions may require additional expenditures initially, over time, these alternative sanctions carry the promise of reduced systems costs through reductions in crime.

4. **Restrict the use of fines, fees, and forfeitures in cases involving juveniles.** The bulk of attention regarding these practices has been focused on the use of fines, fees, and forfeitures in adult courts, but the same practices are used against juveniles.[135] A 2016 report by the Juvenile Law Center, for example, documented the imposition of economic sanctions and poverty penalties against juveniles adjudicated delinquent and their families.[136] A related empirical investigation by Alex Piquero and Wesley Jennings linked the use of economic sanctions with increased rates of recidivism among juveniles.[137] In 2017, the Policy Advocacy Clinic at the University of California-Berkeley School of Law released an in-depth examination of the use of administrative fees in juvenile courts in California, and the resulting harms to low-

133. *See, e.g.*, Noah Zatz, *Get to Work or Go to Jail: Free Labor in the Shadow of Mass Incarceration*, ACSBlog (Nov. 16, 2015).

134. *See Benefit-Cost Results,* Wash. State Inst. for Pub. Pol'y, http://www.wsipp.wa.gov/BenefitCost (last updated Dec. 2016).

135. For a discussion of juvenile justice issues, see Barry C. Feld, "Juvenile Justice," in Volume 1 of the present Report.

136. *See generally* Feierman, *supra* note 10.

137. *See generally* Piquero & Jennings, *supra* note 46.

income juveniles and their families.[138] Each of these reports affords a better understanding of how juvenile courts are also contributing to the modern debtors' prison crisis. Lawmakers should consider reviewing juvenile court practices to assess the extent to which the use of economic sanctions conflict with the juvenile justice system's primary aim of rehabilitation and the constitutional rights articulated above.

Again, while the reduction of the use of economic sanctions in juvenile courts may require the development of non-incarcerative alternatives, as in the adult context there is the potential to improve outcomes while simultaneously reducing governmental expenditures. The WSIPP meta-analysis, for example, showed that, with respect to juveniles, for every dollar spent, education and employment training had a benefit-to-cost ratio of $31.24, various therapy programs had benefit-to-cost ratios ranging between $1.64 and $28.56, and participation in mentoring programs had a benefit-to-cost ratio of $6.53.[139] The use of supportive programming in lieu of economic sanctions has the potential for significant fiscal benefit while promoting the rehabilitative aim of juvenile justice systems.

5. **Require criminal conviction for forfeiture.** With widespread support among both conservative and liberal organizations,[140] a growing number of states prohibit the use of civil asset forfeiture, requiring instead that forfeitures may occur only upon criminal conviction.[141] Unlike the reforms discussed above, there is no question that this proposal will result in a considerable reduction in the revenue-generating capacity of forfeiture programs, given that approximately 80% of cases processed through the federal Equitable Sharing Program are civil asset forfeitures, and therefore completed without a conviction and in many cases without criminal charges ever being filed.[142]

   The benefits of this reform, and the reason for its bipartisan support, involve the perception that civil asset forfeiture perverts the presumption of innocence that is the bedrock of criminal justice in the United States by eliminating the requirement that the government prove guilt beyond a reasonable doubt and instead forcing people to prove their innocence.[143]

138. *See generally* Policy Advocacy Clinic, Berkeley Law, Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California (2017).
139. *See Benefit-Cost Results, supra* note 134.
140. *See supra* note 15 and accompanying text.
141. *See, e.g.*, Sibilla, *supra* note 26; *see also* Nelson, *supra* note 91, at 2451.
142. O'Hara & Rich, *supra* note 94.
143. *See supra* note 7 and accompanying text.

There is good reason for this concern, as evidence is mounting that a significant percentage of civil asset forfeitures involve seizures that cannot even pass reduced evidentiary standards. For example, in an in-depth investigative report by the *Washington Post* examining nearly 62,000 cash seizures,[144] only a small fraction of the seizures were challenged, likely due to the lack of access to counsel.[145] In over 41% (4,455) of cases where challenges were raised, however, the government agreed to give back all or a portion of the cash or property, often in exchange for an agreement not to sue regarding the circumstances surrounding its seizure by law enforcement.[146] Therefore, even though this reform will eliminate a significant revenue stream, the requirement of criminal conviction promotes fairness and provides an important protection against government overreach.

6. **Insulate criminal justice actors.** A key component of reforming the use of fines, fees, and forfeitures is to ensure that criminal justice actors are insulated from the pressure to generate revenue and from the benefits of revenue produced from those economic sanctions. Two key reforms in this context involve full funding of criminal justice systems and ensuring that funds are directed away from the control of those criminal justice actors with significant authority over the imposition of fines, fees, and forfeitures.

   Jurisdictions across the country have decimated criminal justice budgets related to all facets of the system, and in particular, for the maintenance of the courts. As just one example, the Oklahoma Legislature cut its funding of district courts by "60 percent between 2008 and 2012"[147] As a result, judges find themselves under pressure to support increases in economic sanctions that bolster judicial budgets,[148] which can lead to an unconstitutional breakdown that pits revenue generation against the due process right to fair proceedings.[149] Lawmakers should take care to

144. *See* Sallah, *supra* note 9.
145. *See id.*; O'Hara & Sallah, *They Fought the Law*, *supra* note 11.
146. *See* Sallah, *supra* note 9; O'Hara & Sallah, *They Fought the Law*, *supra* note 11 (regarding a case where the government agreed to return $13,630 seized in exchange for an agreement not to sue); *id.* (reporting that in its investigation, the Washington Post found more than 1,000 cases involving agreements not to sue).
147. Carter & Adcock, *supra* note 87.
148. *See, e.g.*, ACLU, *supra* note 15, at 25–28; Brownstone, *supra* note 89.
149. *See, e.g.*, Colgan, *supra* note 31, at Part I.A.1.

insulate judicial actors from the jurisdiction's financial interests to avoid tainting the judicial process, and do so in part by providing full funding to the courts.[150]

In addition, lawmakers can also reduce the profit motive that exists for criminal justice actors involved in the imposition of fines, fees, and forfeitures. For example, so long as law enforcement agencies are allowed to retain funds seized through forfeiture processes, the risk remains that law enforcement priorities will be distorted to focus on crimes for which revenue are readily available rather than crimes—including violent crimes—that do not carry forfeiture opportunities.[151] Lawmakers can reduce this incentive by requiring that money obtained through forfeiture is transferred to a general or other fund unrelated to law enforcement or prosecution spending, a practice already in place in several jurisdictions.[152]

Full funding of criminal justice systems is, of course, not revenue-neutral. However, although revenue generated through forfeiture will be significantly reduced if the prior reform requiring a criminal conviction is adopted, forfeitures obtained in conjunction with a criminal conviction can also generate significant revenue.[153] That revenue in turn could be used to bolster criminal justice budgets—and even to fund law enforcement and prosecution activities in a manner promoting budgetary oversight of criminal justice priorities—which has the dual benefit of reducing the profit incentive created through retention of forfeited cash and property while also decreasing the need to rely on fines and fees to fund the criminal justice system.

7. **Provide meaningful access to indigent-defense counsel.** While as detailed above, open questions remain regarding the reach of the constitutional right to counsel under the Sixth Amendment and Due Process Clause, it is important to understand that whether people are provided access to counsel is not simply a constitutional issue—which provides only a floor for when provision of counsel is required—but a policy choice within

150. *See* Natapoff, *supra* note 125.

151. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Just. 171 (2001) ("The primary implication tied to these findings is that a conflict of interest between effective crime control and creative fiscal management will persist so long as law enforcement agencies remain dependent on civil asset forfeiture.").

152. *See, e.g.*, Nelson, *supra* note 91.

153. *See, e.g.*, State v. Goodenow, 282 P.3d 8 (Or. Ct. App. 2012) (upholding the forfeiture of $960,843 that constituted direct proceeds of the crime of conviction).

lawmakers' control.[154] Provision of counsel provides an important check against the worst consequences of the use of fines, fees, and forfeitures, because as jurisdictions began slipping further and further from the constitutional dictates detailed in Part II of this chapter, counsel has the capacity to seek the enforcement of those restrictions.[155]

Of course, the use of counsel as a check against governmental abuses is meaningful only if access to counsel is expanded and indigent-defense systems are fully funded so that counsel has the capacity to issue challenges to unconstitutional activity.[156] This is an expensive endeavor, but one that has the benefit of helping check jurisdictions before they slip into systemic and unconstitutional practices, and thereby helps ward off the likelihood of costly litigation on those grounds.[157] And, as with other aspects of the criminal justice system, funds collected through properly designed fines, fees, and forfeitures, with insulation to ensure indigent-defense budgets are not dependent upon the imposition of such economic sanctions on defense clients, could be used to fund indigent-defense programs.[158]

8. **Implement data-collection practices.** Finally, as reforms are instituted regarding the use of fines, fees, and forfeitures, it is important to collect data regarding a wide variety of issues, including changes in the average amount of fines collected, collection outcomes, and changes in recidivism. While data collection does require the outlay of resources, it is critical for assessing whether reforms are functioning as intended, need adjustment, or are insufficient to address the types of policy and constitutional concerns detailed herein. Therefore, as with criminal justice reforms more broadly, data collection helps provide a foundation for transparency regarding the operation of criminal justice systems and an opportunity to ensure that the ills that stem from poorly designed systems for imposing and collecting fines, fees, and forfeitures are in fact cured.

154. *See, e.g.*, Colgan, *supra* note 31, at Part III.B.

155. *See generally id.*

156. *See id.* at Part III.B; Eve Brensike Primus, "Defense Counsel and Public Defense," in Volume 3 of the present Report.

157. *See supra* note 60 and accompanying text.

158. Jennifer Earl, *Civil Asset Forfeiture: Fund Public Defenders Instead of the Police*, The Hill (Feb. 15, 2017).