TOO POOR TO PAY
How Arkansas’s Offender-Funded Justice System
Drives Poverty & Mass Incarceration

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About the Lawyers’ Committee for Civil Rights Under Law:

The principle mission of the Lawyers’ Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers’ Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar’s leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.

About the Criminal Justice Project:

The Lawyers Committee for Civil Rights Under Law established its Criminal Justice Project to address racial disparities within the criminal justice system that contribute to mass incarceration. This work includes challenging laws and policies that unfairly burden African American communities, including, the unconstitutional jailing of poor defendants solely because they are unable to pay criminal justice debt that results from court-imposed fines, fees, and costs. Our work also concentrates on improving pretrial justice, including ending practices that rely on “money bail” and make a person’s access to freedom dependent upon their ability to pay; and promoting programs and policies that ensure equality and fairness in policing and court operations. The Lawyers’ Committee uses litigation, advocacy and public education to help achieve a more just and equitable criminal justice system.
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EXECUTIVE SUMMARY

Prison population rates, of which the United States has the highest in the world, are often cited as a defining feature of mass incarceration. Incarceration rates in local jails, however, are a lesser known but significant catalyst for mass incarceration. On any given day, thousands are detained in local jails. Some are waiting to be transferred to serve longer sentences in prison, many are being held in pretrial detention, but most will be released after relatively short periods of time with criminal records and court-imposed debt that will tether them to the system for many years.

The U.S. Commission on Civil Rights has observed that people of color, the poor, and people with disabilities—who suffer poverty at twice the rate of persons without disabilities—are disproportionately impacted by inability to pay court-imposed costs, fines and fees associated with misdemeanors and low-level offenses. In Arkansas, thousands have been jailed, often repeatedly, for weeks or even months at a time, simply because they are poor and cannot afford to pay court costs, fines and fees. They face numerous collateral consequences in addition to loss of freedom, including loss of employment, homelessness, and some have lost custody of their children when they were unable to pay fines and fees established by the state legislature to offset the growing costs of maintaining Arkansas’s massive criminal justice system.

In addition to arrest and incarceration for nonpayment of fines and fees, thousands of Arkansans have had their driver’s licenses suspended, even though the underlying offenses had nothing to do with driving. This consequence is particularly devastating in a mostly rural state like Arkansas, with limited access to public transportation. The routine suspension of driver’s licenses for nonpayment of fines and fees leaves many residents caught between the proverbial rock and a hard place; they find themselves either without transportation to work, school, medical appointments, and other crucial destinations, or they make the difficult choice to drive without a valid license and face additional charges and fines they cannot afford to pay.

With major support from Arnold Ventures1, the Lawyers’ Committee for Civil Rights Under Law has been investigating the structures that support the growth of modern-day debtors’ prisons in Arkansas, and working to help lay the groundwork for dismantling those structures across the state. Our efforts have been aided by volunteers and pro bono resources that are the lifeblood of the Lawyers’ Committee, which was established in 1963 to generate the assistance of private lawyers in advancing the political promise of civil rights, the economic promise of social rights, and thus, equal justice under law. We are grateful for the work devoted to this report by attorneys and staff from Venable LLP and Ropes & Gray LLP; economists from The Brattle Group; the students and staff of Harvard University’s Criminal Justice Policy Project, the Bowen School of Law at the University of Arkansas-Little Rock, and the University of Arkansas School of Law; and volunteers from decARcerate Arkansas.

1 The views expressed in this report are those of the authors and do not necessarily represent those of Arnold Ventures.
During our investigation, we interviewed 205 individuals who were charged and/or incarcerated as the result of their inability to pay fines and fees. We also performed court-watching in eight counties, sent nearly 300 requests pursuant to Arkansas’s Public Records Act, and interviewed judges, government officials, and representatives from multiple Arkansas-based social services organizations. These are our major findings:

- The Arkansas Fines Collection Law requires consideration of an individual’s ability to pay prior to incarceration for nonpayment of fines and fees, but it does not enumerate types of information to be considered by judges when making an ability to pay determination.

- Many judges proceed directly to the penalties prescribed by the Arkansas Fines Law, without first conducting the ability to pay determination required by the Law, or after conducting only cursory inquiries about things irrelevant to an ability to pay determination, such as whether defendants possess smart phones or have tattoos.

- When individuals are unable to pay fines and fees, the Arkansas Fines Collection Law permits courts to order additional time for payment, reduce the amount of each installment, or revoke the fine or unpaid portion in whole or in part. Judges are not effectively utilizing these options.

- Missed payments are a common occurrence in Arkansas, where nineteen percent of the population lives in poverty, and African Americans and Hispanics are twice as likely to suffer poverty. Missed payments often result in “process-based” charges, like Failure to Pay, Failure to Appear, and Contempt, that result in additional fines and penalties.

- Poor recordkeeping in Arkansas courts exacerbates the challenges faced by indigent defendants. Defendants often have no way to track the total debt owed or ensure their payments are properly applied to their outstanding debt.

- Prolific use of arrest warrants and driver’s license suspensions as methods of enforcing payment of fines and fees traps poor Arkansans in a vicious cycle of poverty and incarceration.

This report intends to present a broad view of the problem of indigent incarceration in the State of Arkansas and outline the clear conclusion of our investigation: Many judges proceed directly to the punishments available through the Arkansas Fines Collection Law without first conducting the ability to pay determination mandated by Arkansas state law and federal law.

Thousands have been incarcerated for nonpayment of fines and fees without requiring the State to meet its burden under the Fines Collection Law; proving that an individual’s nonpayment is the result of a purposeful refusal to obey a sentence or failure to make a good faith effort to obtain the funds for payment.
 Defendants are routinely sent to jail without any meaningful consideration of their ability to pay. Sometimes hearings last less than two minutes, and defendants regularly face incarceration without a lawyer to defend them or a court reporter to record the proceedings. In the absence of basic procedural safeguards, poor Arkansans who are not able to pay the cost of a traffic ticket or other imposed fine are often charged with new process-related offenses such as Failure to Pay, Failure to Appear, Failure to Comply, or Contempt of Court. More charges lead to more fines and the cycle becomes endless.

Though many jurisdictions have embraced the incarceration of people who owe fines and fees as a method of “forcing” payment and thereby generating revenue for municipal budgets, ironically, the cost of incarcerating thousands of Arkansans likely outpaces courts’ ability to collect. Moreover, the downstream effect—the incarceration of individuals for indigency—has a disproportionate effect on communities of color and the poor. In the end, poverty is criminalized, mass incarceration expands, and economic inequality becomes more entrenched across the state.

This report suggests a road map for those seeking to conduct effective policy advocacy, community organizing, and litigation to bring an end the harmful and unlawful jailing of individuals due to their poverty. PART I examines the problem of indigent incarceration from the historical origin of debtor’s prisons through the growth of indigent incarceration in the State of Arkansas. PART II considers the negative consequences flowing from Arkansas’s current fines and fees enforcement practices. PART III explores progress toward ending indigent incarceration across the United States, and suggests a path forward for Arkansas.

To catalyze reform efforts, the report also presents RECOMMENDATIONS concerning simple remedial measures that should be implemented immediately to ensure the enforcement of fines & fees in Arkansas in a manner consistent with the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution:

- End the practices of issuing arrest warrants, incarcerating (including through probation revocation), and suspending the driver’s licenses of individuals for failing to pay fines and fees without affording Defendants notice that their ability to pay is a critical issue and providing them the opportunity to be heard during a proceeding where the court conducts an individualized “ability to pay” inquiry.

- Adopt judicial “bench cards” or similar resources detailing procedures for determining a defendant’s “ability to pay” in a manner consistent with the Arkansas Fines Collection Law, which defines “ability to pay” as “the resources of the defendant, including all available income and resources...sufficient to pay the fine and provide the defendant and his or her dependents with a reasonable subsistence compatible with health and decency.”

We dedicate the report to Arkansans like Samantha Booten, who struggled with drug addiction that took her life in May 2017, at 28 years old. This mother-of-two spent half of the last four years of her life—nearly her daughter’s entire life—in jail for nonpayment of fines and fees stemming from two tickets in 2013; one for failure to wear a seatbelt and another for using a false name. Samantha bounced from county to county as process-based charges related to her original tickets became stacked one atop the other; incarceration in White County caused failure to appear charges in Saline County, resulting in rounds of incarceration in both counties. At the time of her death, Samantha had active cases in at least four counties. At no point during those four years and her multiple engagements with Arkansas courts and judges did anyone make a meaningful inquiry into Samantha’s ability to pay court-imposed fines and fees.
To whom it may concern:

My name is Samantha Boston. I am currently incarcerated in Saline County Jail for failure to appear. I have fine payments for Searcy and White County. I am writing you for two reasons: first, I was wondering if you could suspend my fine payments until I get out. My court date is on the 7th of March but if I get out sooner, I will contact you first. Second, I was also wondering if you could send me some information on the dates of my incarceration from Oct 7 - Nov 25th. Please because while I was in White County Jail Saline County put out a warrant for my arrest for not showing up to court but there was no way I could have went to court because I was there. So will you please send me that information as quickly as possible so I can get it to the judge here that way my failure to appear will get dropped. I appreciate your time and consideration.

Thanks

Samantha Boston
INTRODUCTION

Jails exist in nearly every city and town in America, yet they have been largely ignored by policymakers and advocates in criminal justice reform until recently. Much of the conversation surrounding mass incarceration has focused on the fact that the United States maintains the largest prison population in the world.\(^1\) Incarceration rates in local jails, however, are a lesser known and increasingly powerful catalyst for mass incarceration. In its 2015 report, “Incarceration’s Front Door: The Misuse of Jails in America,” the Vera Institute found that over the course of a year, nearly 12 million jail admissions were recorded in the United States, a rate 19 times higher than the annual prison admission rate.

Despite overall falling crime rates, Arkansas’s incarceration rate increased by more than 20% between 2004 and 2014, the fastest rate of growth in the country.\(^2\) If crime in Arkansas is not getting worse, why is Arkansas sending more people to jail and prison?

In her book “Punishment Without Crime,” legal scholar Alexandra Natapoff argues that mass incarceration has been driven by misdemeanors, and by extension local jails. From traffic and public order offenses to other low-level petty offenses, misdemeanors result in nearly 13 million criminal filings in the United States each year.\(^3\) The problem is especially concerning because misdemeanor charges often result from poverty and carry with them the punishment of additional debt.\(^4\) The White House Council of Economic Advisors found that “[i]n some jurisdictions, approximately 20 percent of all jail inmates were incarcerated for failure to pay criminal justice debts.”\(^5\)

When poor people and people of color are over-policed for minor violations on the front end of the system, their vulnerability to accruing misdemeanor charges and associated criminal justice debt grows exponentially. This issue entered the national spotlight in 2014, after a police officer shot and killed Michael Brown in Ferguson, Missouri. The Department of Justice investigation revealed extreme and consistent disproportionate enforcement of minor violations by the Ferguson Police Department against African Americans, who accounted for 85% of traffic stops over the course of two years, despite making up only 67% of the population. The imbalance was even more drastic for some specific charges: African Americans received 95% of Manner of Walking in Roadway charges and 94% of Failure to Comply charges.

Greater exposure to the criminal justice system equals greater exposure to criminal justice debt. This report examines practices in the State of Arkansas that result in the incarceration of individuals who are simply too poor to pay.
PART I:
THE ROOT OF ARKANSAS’S INDIGENT INCARCERATION PROBLEM

I. Historical Origin of Debtors’ Prisons in the United States

Common in the 17th through 19th centuries, debtors’ prisons were public prisons that served to incarcerate individuals who failed to pay private debts. Intended both as a punishment and as an incentive to pay one’s debts promptly, incarceration for failing to pay one’s debts often turned into a lengthy ordeal for the affected individual. Debtors were not released from prison until they either were able to find funds to pay their debts or could work off their debts through prison labor. Many debtors died in these prisons, as conditions were terrible, and incarcerated debtors had to provide their own means of survival, including food, blankets, and fuel for basic warmth.

Debtors’ prisons were outlawed at the federal level in 1831, and a series of state laws passed in the decades following made debtors’ prisons similarly illegal in some states. It was not until the second half of the 20th century, however, that the Supreme Court weighed in on the issue of incarcerating indigent debtors. Three cases—Williams v. Illinois, Tate v. Short and Bearden v. Georgia—established that the practice of incarcerating those too poor to pay debts was unconstitutional.

In Bearden v. Georgia, the Supreme Court held that a sentencing court could not revoke a defendant’s probation for failure to pay an LFO absent evidence that “the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.” The Court also stated that “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.” Further, the Court held that even “[i]f probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the [state] court must consider alternative measures of punishment other than imprisonment.” The Court reasoned that “[t]o do so otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.”

As a result of the Bearden decision, defendants may not be jailed for failure to pay an LFO unless a court concludes that they (1) willfully failed to pay; (2) failed to make sufficient efforts to secure money to pay; or that (3) no adequate alternatives to incarceration exist.

II. Modern Growth of Indigent Incarceration

Though debtors’ prisons are by law unconstitutional, recent decades have seen a marked rise in the number of individuals who are nonetheless incarcerated for failing to pay either public or private debts. The 1980s and 1990s marked a significant increase in the number of state and county justice systems that imposed fees and fines on individuals who interacted with the justice system. The problem has been exacerbated in the 21st century as “offender-funded justice”—a system where the accused offender must pay the cost of his or her own prosecution, incarceration, and rehabilitation—has been popularized.
The terms “legal financial obligations” (“LFOs”) and “criminal justice debt” are often used as “catchall” phrases for financial charges assessed in the criminal justice system. Common LFOs include: (1) fines; (2) fees; (3) surcharges; (4) interest and penalties; and (5) restitution. These charges “exist at all stages of the criminal justice process, including pre-conviction, sentencing, incarceration, probation, and parole.” Individual LFO components differ in several respects, including: “[1] when they are assessed; [2] what they include; and [3] why they are imposed.”

For example, a fine may be the sole form of punishment for traffic offenses or other misdemeanors or it may supplement incarceration or probation. By contrast, fees “can be imposed at any stage of the criminal justice process, including pre-conviction, sentencing, incarceration, or supervision.” Collectively, LFOs are often used by municipalities and courts to secure government revenue, creating incentives for “courts and other government actors … to bring revenue into their own operating budgets through the imposition and enforcement of criminal justice debt.” Reliance on LFOs as a source of revenue has become pervasive, as tax revenue and other sources of operating income have declined.

City councils have increasingly depended on their municipal courts to make up the shortfalls, demanding that judges and court clerks collect as much money as possible with little regard for the impact on indigent defendants who may be unable to pay. Some local court systems have taken the practice of confining debtors even further, granting arrest warrants at the request of private debt collectors and collection companies attempting to collect on private debt. Most of these courts do not provide counsel for low-income people charged with traffic or petty misdemeanor offenses, reasoning that there is no entitlement to counsel because the available statutory penalties are monetary and do not include jail time. Ironically, when those statutory penalties are not paid, the individuals are ultimately jailed for non-payment.

Although not exhaustive of nationwide changes in these laws, several studies have reported the increase in the use of fines and fees in the criminal justice context. In 2010, the Brennan Center for Justice published the results of a survey of 15 states with the highest prison populations (comprising 69% of all state prisoners nationally), finding that most of the states surveyed had increased the types of fees and the dollar amounts of each fee during the first decade of the 2000s.

In 2014, National Public Radio (“NPR”) conducted a state-by-state survey, which found that defendants in many states are now charged for many governmental services that were once free, including those that are constitutionally required. In addition to the court-imposed fines and fees, interest, late fees, payment plans, or collection fees accrue in parallel for those who are unable to pay fees or fines on time.

The Brennan Center study noted that “states are introducing new user fees, raising the dollar amounts of existing fees, and intensifying the collection of fees and other forms of criminal justice debt such as fines and restitution.” Some of these fee
and fine increases have been proposed and enacted in part to make up for shortfalls in funding for the judiciary system, like covering the salaries of court employees, for heat, telephones, copy machines, and other associated expenses.25

III. The Legal Foundation of Arkansas’s Fines & Fees System

The Arkansas Criminal Code of 1976 imposes fines, costs, and restitution for certain criminal convictions and violations.26 In its Original Commentary on the Arkansas Fines Collection Law, adopted in 1995, the Arkansas Criminal Code Revision Commission foreshadowed current problems with enforcement of the law:

“Fines often punish the family of a defendant more than the defendant. . .in some localities the prospect of the additional public revenue generated by fines has unfortunately distorted the entire criminal process…. [To address these concerns], the Commission elected to rely on the maximum limits established by this section; the natural limits imposed by the offender’s ability to pay; and the excessive fine prohibition of article 2, section 9 of the Arkansas Constitution to control the power to impose fines.”27

By law, courts are authorized to issue an arrest warrant and imprison an individual for nonpayment of court debt only if the default was due to a purposeful refusal to obey the sentence or failure to make a good faith effort to obtain the funds required.28 The Arkansas Court of Appeals has upheld this limitation, finding that “a sentence to imprisonment for nonpayment of a fine works an invidious discrimination against indigent defendants in violation of the equal protection clause of the Fourteenth Amendment.” Drain v. State, 10 Ark. App. 338, 341 (1984). Despite this limitation, Arkansas Circuit and District courts have routinely issued warrants and arrested individuals without consideration of whether their nonpayment was the result of an inability to pay court debt.

A. Failing to Consider Ability to Pay

The Arkansas Fines Collection Law, enacted in 1995, requires consideration of an individual’s ability to pay prior to incarceration, but the mandate is regularly disregarded by Arkansas courts. Section 16-13-701 of the Fines Collection Law provides procedures for “the assessment and collection of all monetary fines, however designated, imposed by circuit courts and district courts for criminal convictions, traffic convictions, civil violations and juvenile delinquency adjudications.” Although it anticipates full payment of a fine immediately following imposition and orders courts to ask an individual what arrangements he or she has made to comply with the court’s order to pay the fine, it also establishes a protective procedure that many Arkansas courts fail to follow.

For example, the Fines Collection Law requires that courts must make an ability to pay determination if an individual claims an inability to pay the fine.31 “Ability to pay means that the resources of the defendant, including all available income and resources, are sufficient to pay the fine and provide the defendant and his or her dependents with a reasonable subsistence compatible with health and decency.”32 If an individual is unable to pay his

**JAUVENILE FINES & FEES**

Juveniles are routinely charged detention, probation supervision, electronic monitoring, and drug testing fees. Parents or guardians may be held liable for the juvenile’s court debt. Some states require an ability to pay determination before a family member can be required to pay a juvenile’s court debt, a broader protection than that afforded to adult defendants. Similar to adults, however, ability to pay determinations in the juvenile context may be cursory or non-existent.

In 2016, the Juvenile Law Center profiled Arkansas in its groundbreaking report, “Debtors’ Prison For Kids?”, which examined fines and fees enforcement in the juvenile justice system. They interviewed a 13-year-old who was incarcerated for three months because his mother could not afford to pay the discretionary truancy fine of $500 levied against him. The young man appeared in court without a lawyer or a parent and reported that he was never told that his ability to pay was a critical issue nor did the judge inquire as to his ability to pay. “[M]y mind was set to where I was just like forget it, I might as well just go ahead and do the time because I ain’t got no money and I know the [financial] situation my mom is in. I ain’t got no money so I might as well just go and sit it out.”
or her LFOs, the court is authorized to enter an order “revoking the [LFO] or the unpaid portion thereof in whole or in part.” Unfortunately, Arkansas courts rarely exercise this authority.

Similarly, if an individual can ultimately pay the LFO, but the court concludes that immediate payment would cause “a severe and undue hardship” for the defendant and the defendant’s dependents, the court may issue an order to authorize installment payments until a specified date, but may also assess a monthly installment payment fee on top of the payment. If installment payments are ordered, a defendant can be required to appear in court to explain any failure to pay and a monthly installment fee will be assessed. Because the statute does not enumerate types of information to be considered before making an ability to pay determination, Arkansas judges regularly fail to conduct a meaningful inquiry into individuals’ resources, resulting in installment plans that many individuals simply cannot afford to pay.

In fact, Arkansas courts disagree about the scope of a court’s duty to inquire regarding an individual’s inability to pay. Some courts require affirmative findings of fact that an individual willfully refused to pay before sentencing. Other courts require an individual to affirmatively assert inability to pay, even if the court does not conduct an affirmative inquiry. In practice, many courts do not conduct ability to pay determinations or consider evidence of inability to pay when introduced.

Another significant marker of Arkansas’s enforcement of fines and fees is the employment of a burden shifting approach with regard to evidence of non-payment. Once the state establishes that a defendant failed to pay, the burden shifts to the defendant to offer a reasonable excuse for nonpayment. By law, courts should not sentence an individual to jail for nonpayment if the individual shows that “his or her default was not attributable to a purposeful refusal to obey the sentence of the court or to a failure on his or her part to make a good-faith effort to obtain the funds required for payment.” Ark. Code Ann. § 16-13-703(c)(1). When the defendant asserts an inability to pay, the Arkansas Fines Law mandates that the State must prove, by a preponderance of the evidence, that the non-payment was inexcusable. Only then does the law allow issuance of an arrest warrant or summons for appearance, imprisonment, and loss of motor vehicle registration or driver’s license for nonpayment of fines and fees.
Problematically, many judges proceed directly to the consequences prescribed by the Arkansas Fines Law without first conducting the ability to pay determination required by the Law. As a result, thousands have been unlawfully incarcerated solely because they are too poor to pay.

### B. Expansion of Fines and Fees That Penalize Poverty

The state-by-state study conduct by NPR underscores the expansion of fines, and especially fees, as avenues of revenue generation for local criminal justice systems. Of the 51 states surveyed in 2014 (including the District of Columbia), 48, including Arkansas, had increased civil and/or court criminal fees, added new ones, or both since 2010. In addition, the percentage of prison inmates with court-imposed monetary sanctions substantially increased from 1991 to 2004. While 25% of inmates had reported receiving court-ordered fines and sanctions in 1991, 66% reported the same in 2004.

Of all categories of offender-funded justice assessments, the largest category is fees. Each of the 15 states surveyed by the Brennan Center charge a broad range of fees without taking into account the individual’s ability to pay and have jurisdictions that arrest people for failing to pay court-related debt. All 15 states also impose fees that attach upon conviction, impose parole, probation, or other supervision fees, and have laws authorizing the imposition of jail or prison fees. Thirteen of the states charge public defender fees for exercising the individual’s right to counsel. Fourteen of the 15 states also use “poverty penalties,” charging additional late fees, payment plan fees, and interest when individuals were unable to pay debts up front.

Those accused of misdemeanors and other low-level offenses are often herded through court proceedings like cattle and without the assistance of counsel. Their guilt is assumed, rather than proven, and they are fined and placed on payment plans if they do not have the money to immediately pay the fines, which results in additional court-imposed costs and fees. Nineteen percent of Arkansas’s population lives in poverty, with African Americans and Hispanics being twice as likely to suffer poverty in Arkansas than whites. Therefore, missed payments are a common occurrence.

Our investigation revealed that in many Arkansas jurisdictions, missed payments result in “process-based” charges, like Failure to Pay, Failure to Appear, and Contempt, that result in additional fines and penalties. The following graphs analyze charges for which individuals were booked into detention facilities in Franklin County (2/22/18 – 11/16/18) and Sebastian County (8/24/15 – 11/8/18) as examples of Arkansas’s heavy use of process-based charges that generate additional LFOs. The graphs consider:

1. “Only FTP Charges” = booking events for failure to pay only.
2. “Only Other Court-Imposed Charges” = booking events for process-based charges other than FTP, e.g., failure to appear, contempt, etc.
3. “Only Other Potentially Poverty Related Charges” = booking events for non-process-based poverty charges, e.g., driving on a suspended license, parole violation, no proof of insurance, etc.
4. “Mix of Poverty-Related and Other Charges” = booking events for more than one poverty-related charge, but without charges unrelated to poverty.
Beyond increased monetary penalties, FTP charges can result in additional jail time for individuals who are too poor to pay fines and fees. Similarly, for those under community corrections, missed payments often mean probation and parole violations that result in re-incarceration and additional fines and fees.

Chris P. on living in fear of having his probation violated for inability to pay probation fees:
“It had a huge impact on my life,” he said. “It made me into something I was not.”
C. Cost to Taxpayers

Poor people ultimately pay more for fines and fees in the form of long-term payment plans with high interest rates, and additional penalties and costs associated with missed payments. The tax-paying public, however, also pays the financial cost of incarcerating individuals too poor to pay fines and fees. Take, for example, Faulkner County, which had 124 booking events based on FTP-only charges during the seven-months between June 1 and December 31, 2016. These 124 booking events resulted in over 600 days of jail time. At a cost of $39/day\(^47\), these incarcerations cost taxpayers approximately $24,000 over seven-months. Looking more broadly at all process-based charges, the cost to taxpayers is even higher:

THE ECONOMICS OF INDIGENT INCARCERATION IN FAULKNER COUNTY

Population: 113,237 (81% White; 12% Black; 4% Hispanic)
Poverty Rate: 16%

FINE-RELATED CHARGES BY BOOKING EVENT

- 809 booking events occurred between June 1 and December 31, 2016
- The 809 booking events resulted in 9,800 days of jail time
- The time served over the seven months could fill the Faulkner County Detention Center for 20 days
- At $39/day, approximate cost to taxpayers is $380,000 over seven-months

When individuals are unable to pay fines and fees, the Arkansas Fines Collection Law permits courts to order additional time for payment, reduce the amount of each installment, or revoke the fine or unpaid portion in whole or in part. Because courts are not conducting comprehensive inquiries into ability to pay, they cannot effectively utilize these options. Instead, courts move directly to the punitive consequence reserved for individuals who refuse to pay or make no effort to try to pay; imprisonment until the fine or specified portion is paid. The graphs below analyze the average length of incarceration for individuals booked into Faulkner County between June 1, 2016 and December 31, 2016:
LENGTH OF INCARCERATION (Days between Booking and Release) FOR PROCESS-BASED CHARGES, excluding FTP charges.

(Average 12.1 days in jail)

Assuming the 7-month data sample is representative, Processed-Based charges would result in an annual:

- Time-in-jail of ~16,800 days
- Cost of ~$650,000 per year to taxpayers

LENGTH OF INCARCERATION FOR FTP-ONLY CHARGES

(Average 5.1 days in jail)

Assuming the 7-month data sample is representative, FTP charges would result in an annual:

- Time-in-jail of ~1,100 days
- Cost of ~$42,000 per year to taxpayers
PART II:
CONSEQUENCES OF ARKANSAS’S SYSTEM OF OFFENDER-FUNDED JUSTICE

I. Repetitive Cycle of Incarceration

Incarceration of defendants without a pre-deprivation determination that their non-payment was willful is a routine occurrence in Arkansas. During court watching, we observed that judges fail to consider ability to pay altogether, as well as refuse to lower payment amounts even when they do hear evidence on this defense. Judges often set fixed minimum installment payment amounts for all defendants without individualized consideration of ability to pay. This practice is best exemplified by the Lawyers’ Committee’s most recent litigation against Judge Mark Derrick in White County, Arkansas.

Judge Derrick maintains a “Zero Tolerance” policy concerning non-payment of court-imposed debt. The Zero Tolerance policy is posted on a sign in the Beebe Department of White County. In accordance with his policy, Judge Derrick routinely levies substantial fines, fees and costs against persons convicted of even the most minor infractions, and requires them to pay monthly amounts of at least $100, and sometimes several hundred dollars, towards court-imposed debt.

As alleged in our lawsuit, if an individual fails to pay this amount in full, Judge Derrick subjects them to arrest, driver’s license suspension, and incarceration, as well as an additional $450 to $670 in fines and costs. He routinely issues arrest warrants for failure to pay, fixing bonds at the amount of the entire debt in cash, and holding individuals who cannot pay for weeks or even months until their case is adjudicated. He does not credit the jail time against their debt; instead, the jail time is in addition to new debt imposed. He imposes these punishments without conducting any inquiry—let alone an adequate one—into the person’s ability to pay or the reasons for non-payment. Similar practices were observed in other Arkansas courts, including during probation revocation hearings.

II. Probation Revocation

Probation and parole revocations have been a key driver of growth in Arkansas’s state prison population, accounting for 71% percent of all prison admissions in Arkansas. Many probationers who commit low-level violations of the terms of their supervision are sent to prison. Between Fiscal Year 2009 and Fiscal Year 2015, over one-third of people admitted to state prison had violated some form of probation. Additionally, there are no statutory limits on the length of sanctions for technical violations of probation, such as nonpayment of fees. On average, individuals spent more than 11 months in prison for technical violations of probation in Fiscal Year 2015.

As in Arkansas, over 1,000 courts in the United States place probationers under the supervision of for-profit probation companies and require them to make monthly payments for their services. Defendants receive “pay only probation” when they could not afford to pay their fines and costs immediately and in full. They are required to pay the probation company to collect their money and monitor their payment history. This system disadvantages the poorest individuals: the longer it takes them to pay their fines and costs, the longer they remain on probation and the
more they pay in supervision fees.55

Perversely, the poorest individuals ultimately pay the most money. Courts also order other defendants to complete and pay for substantive conditions of probation in addition to supervision, such as community service, classes, drug or alcohol testing, or monitoring technology.56 Probation revocations due to failure to fulfill conditions of probation can result in a probationer being incarcerated much longer or paying substantially more than the statutory limit for the underlying offense.

The National Task Force on Fines, Fees, and Bail Practices has provided guidance to state court judges concerning the collection of LFO. In its publication, Lawful Collection of Legal Financial Obligations: A Bench Card for Judges, the Task Force sets forth the following guideline:

“Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State’s interest in punishment and deterrence.”57

Further, the Arkansas Fines Collection Law authorizes revocation of probation for failure to pay as long as the court finds, by a preponderance of the evidence, that (1) probation is conditioned on payment of fines and/or restitution, and (2) the individual has inexcusably failed to comply with this condition.58 The court may also extend the probation period if probation is conditioned on an individual making restitution payments and the individual failed to do so.59 The problem here, as discussed previously, is that courts revoke or extend probation for nonpayment, often on the word of private probation companies, without determining that the default was inexcusable.

Despite the Task Force’s clear instruction, and contrary to Arkansas state law, we observed several judges conducting only cursory inquiries into defendants’ ability to pay during probation revocation hearings, if at all. Often, the entire inquiry rests on a judge’s observations of whether defendants possess random items, such as cigarettes, smart phones, or brand name clothing.60 We observed that courts often fail to address ability to pay at probation revocation hearings altogether, unless the defendant raises the issue.

In failing to conduct an independent ability to pay inquiry, courts delegate a necessary judicial determination to private probation companies who are not sworn officers of the court. Probation companies submit applications to revoke probation based on failure to meet the
conditions of probation, including failure to pay fees, resulting in incarceration and additional fees. Judges often rubber stamp affidavits for bench warrants from probation companies without inquiry into the probationer’s ability to pay.

Moreover, probation companies have an obvious conflict of interest: their revenue depends on the payment of fees from probationers. Probation companies have a financial incentive to supervise as many probationers for as long as possible. In fact, because probation companies often reward officers for increasing revenue, officers sometimes resort to coercive tactics, including the threat of incarceration, to force payment of supervision fees.

### CRAIGHEAD COUNTY

The operations of the Justice Network, a private-probation company, illustrate many of the concerns about for-profit actors in the criminal justice system. The sole provider of misdemeanor probation supervision in Craighead County for approximately 20 years, the Justice Network collected more than half a million dollars per year off the backs of thousands of largely poor and disproportionately minority Arkansans. When individuals violated the terms of probation, including acts like failing to pay monthly probation or community service fees, the Justice Network worked with the court system in what was effectively a conveyor-belt process to impose additional fines and to imprison them. The Justice Network would file an affidavit with the court indicating which condition(s) were not completed, the prosecutor would sign the affidavit, and the judge would order that restitution be paid for all outstanding fees.

This system resulted in approximately 50,000 outstanding warrants from the misdemeanor court, for more than 8,000 different individuals. There was almost one warrant for every two residents of Craighead County, and an average of more than five warrants for each affected individual. One judge reported that of the 34 people that appeared in his courtroom on one day in August 2016, only six were accused of crimes; the remaining 28 people were jailed solely on warrants issued for failure to pay.

In 2017, Craighead County District Judges David Boling and Tommy Fowler ran for election on a platform of ending the local courts’ relationship with The Justice Network. Once elected, they implemented an amnesty program that expanded payment options and, in some instances, forgave fees owed by probation clients.

The Justice Network sued to stop the judges from waiving probation fees, alleging breach of the contractual relationship between the probation clients and The Justice Network. The federal court dismissed The Justice Network’s claims in 2018. An appeal to the Eighth Circuit Court of Appeals is pending, as of publication of this report.

### III. Driver’s License Revocation

In *Bell v. Burson*, the Supreme Court recognized a driver’s license as a protected interest that cannot be revoked or suspended without notice and an opportunity to be heard. Despite the standard set forth in *Bell*, Arkansas law does not require notice or an opportunity to be heard before the suspension or revocation of a driver’s license. The result is predictable: Arkansas drivers are deprived of their licenses without the procedural due process required by the Fourteenth Amendment.

Arkansas is not an outlier. Millions of drivers across the country have had their licenses suspended for not paying court debt, in fact, the practice is mandatory in 19 states. This creates a vicious and self-perpetuating cycle. Many jobs are inaccessible without the ability to drive, especially in poor communities that have not invested in public transportation. Thus, people are unable to earn a living or even take care of their family, let alone pay outstanding LFOs.

As outlined in a 2018 United Nations report on extreme poverty and human rights in the United States, for a person whose driver’s license is suspended, “two paths are open: [extreme poverty] or driving illegally, thus risking even more serious and counterproductive criminalization.” Forced to decide between destitution and risk of arrest, most people continue to drive with a suspended license. The practice of license suspensions especially impacts people of color, who experience both higher rates of suspension and disproportionate enforcement of driving on a suspended license charges.
We reviewed court records that show Arkansas judges regularly suspend driver’s licenses for failure to pay and/or appear without providing notice to an individual or providing an opportunity to explain whether the nonpayment was willful. Arkansas state law allows courts to merely request that the Department of Finance and Administration revoke, suspend, or refuse to renew an individual’s motor vehicle registration or driver’s license due to nonpayment of LFOs.67

A license suspended for nonpayment is suspended indefinitely; reinstatement is conditioned upon the driver’s successful payment of the outstanding balance and/or the arbitrary satisfaction of the judge, in addition to the mandatory Reinstatement fee imposed by the Arkansas Department of Finance and Administration.68

Also pursuant to State law, courts suspend the driver’s license of any individual who fails to appear for any criminal offense, traffic violation, or misdemeanor charge after being served with notice to appear.69 A license suspended for failure to appear “shall be suspended until the person appears and completes the sentence ordered by the court.”70 Arkansas law does not require notice to an individual that his or her license will be suspended, an explanation of what may be done to avoid suspension, or any opportunity to be heard before suspension. This unconstitutional deprivation has devastating consequences for drivers.

As an initial matter, they often continue driving, unaware their license was suspended until a traffic stop. Once an individual becomes aware of his or her license suspension, often upon release from incarceration, navigating the bureaucratic hoops required to get a new license can prove near impossible.

In addition to paying off existing debt, individuals are also required to pay a reinstatement fee. Documentation such as a birth certificate and copies of previous driver’s license are also required, which can be difficult to obtain without a current, valid identification card. In some cases, law enforcement confiscates suspended driver’s licenses when arresting an individual for driving on a suspended license. Individuals must often make repeated calls to various county courts and state agencies that struggle with their own interagency communication and record keeping. This process requires money and persistence, and can be very time-consuming during a period in someone’s life when time is of the essence. Identification is often necessary for the initial steps of re-entry: housing, employment, benefits, and basic mobility. A suspended driver’s license can be a major roadblock in this phase of rebuilding.71

These examples are but few of the many ways that aggressive efforts to collect fines and fees are harming poor people across the state of Arkansas. They clearly set forth why the U.S. Commission on Civil Rights recently raised the alarm on the injustices perpetuated against poor and minority communities through the collection of fines and fees in the criminal justice system.

The Commission found that in some cities, fines and fees collected by law enforcement from poor and minority citizens serve revenue generation rather than improve public safety. Such practices, the report found, “undermines public confidence in the judicial system.” Moreover, the imposition of fines and fees on poor people and minorities as a method of revenue generation is a major component of mass incarceration.
INCONSISTENT RECORD-KEEPING ACROSS ARKANSAS HARMs THE POOR AND UNDERMINES EFFORTS TO ACCURATELY MEASURE PUBLIC SAFETY

Poor recordkeeping in Arkansas courts exacerbates the challenges faced by indigent defendants. Many courts do not maintain the records required by statute. Defendants often have no way to track the total debt owed or to ensure their payments are properly applied to their outstanding debt.

Arkansans like Tia S., who received two tickets in June 2017 for failure to wear a seatbelt and failure to present proof of insurance, are directly harmed by poor record-keeping. When Tia went to court, she paid for the seatbelt ticket ($70), and was told there was no record of the insurance ticket. After graduating from the University of Arkansas at Pine Bluff later that summer, Tia began working at the Arkansas Department of Human Services. She passed the required background check, which included a search for outstanding warrants. Nevertheless, in February 2018, Tia was pulled over for a traffic stop and arrested on an active warrant for failure to pay the insurance ticket from June 2017.

She spent several hours in jail before her family was able to bail her out. Embarrassed by this experience, Tia returned to work and said nothing about her arrest. Sometime later, her employer learned of her arrest and notified Tia that she had broken state policy by not reporting it. She was fired and has not been able to find a job since then, because she now has a criminal record. Tia still owes additional fines to the court.

Poor record-keeping proved a significant hurdle in our efforts to obtain accurate data concerning the total amount of fines and fees owed to Arkansas courts and the number of individuals who have been detained in Arkansas jails as the result of non-payment of fines and fees. For example, we sent 120 public record requests to Arkansas Circuit Courts, but only five courts responded with complete information and only 13 responded with partial information. Similarly, we sent 104 public record requests to Arkansas District Courts, but only three responded with complete information and 21 responded with partial information.

Accurate records and data are vital for efforts to study crime trends, measure public safety, and improve the administration of justice within the State of Arkansas. Without accurate records and data, the true social and financial costs of indigent incarceration cannot be fully understood.
PART III:
A PATH FOR CHANGE

Across the country, policy makers are beginning to understand that the incarceration of individuals for no other reason than their poverty, undermines the basic principle of our criminal justice system—equal justice for all. The next section of this Report will focus on best practices and recommendations for change within Arkansas’s criminal justice system.

I. Perfecting Application of the Bearden Standard

In Bearden v. Georgia, the Supreme Court held that a court cannot revoke an individual’s probation for failure to pay a court fine or restitution unless such failure to pay was “willful” or there are no adequate alternative forms of punishment.72 The Court further held that imprisoning an individual who tried to pay the fine but simply cannot afford to do so violates the Fourteenth Amendment.73 In reaching this decision, the Court relied on its reasoning in two prior cases: Williams v. Illinois and Tate v. Short, which both held that a court cannot convert a fine to a jail term simply because the defendant cannot afford to pay the fine.74

Bearden also established that courts must assess whether a defendant is able to pay a court-imposed fine before revoking probation and incarcerating a defendant for failing to pay.75 In doing so, the sentencing court must consider whether the individual made “bona fide efforts” to pay the fine but was unable to do so.76 While a court may send an individual to jail for failure to pay a fine, the court must first determine either that this nonpayment was “willful” or that there are no adequate alternatives that would fulfill the state’s dual purposes of punishment and deterrence.77

A. An Imperfect Standard

Bearden does not provide a framework for how to assess a defendant’s ability to pay. As a result, lower courts have struggled to assess whether a defendant “willfully” failed to pay court fines and/or restitutions and what it means for an individual to be unable to pay, leading to inconsistent results in its application. Some courts frequently fail to conduct any sort of formal assessment.78 Even when courts do assess whether the defendant is able to pay, judges often base their determination on a cursory analysis stemming from extraneous factors rather than thoroughly assessing the defendant’s ability to pay.79

To add to this inconsistency, the Bearden Court did not define “willful” or “bona fide efforts” (the two relevant standards of conduct) in Bearden. Rather, a judge making an ability to pay determination under Bearden is left to her own discretion in determining whether Bearden’s standards have been met. For example, a judge would likely compare facts in a case to those in Bearden, which suggest that a defendant’s failure to pay was not “willful” if he is unable to pay despite multiple attempts due to the loss of a job and low prospects at finding another because the defendant was illiterate and uneducated.80 However, Bearden did not present a bright line rule as to what constitutes “bona fide efforts,” because the Court remanded the determination to the lower court for review and a factual determination.81

The lack of clarity in application has likely led to a focus on extraneous factors – such as the defendant’s material possessions at the time of assessment – and has led courts to penalize defendants without fully considering their present ability to pay fines and fees otherwise. In some cases, judges expect defendants to give up expenses and income sources that are essential to their livelihoods, including cancelling their phone service or using money they receive from government assistance like welfare or veterans’ benefits to pay their fees.82 Other courts have considered whether the defendant pays for cigarettes or cable television as evidence of willful nonpayment.83

B. Litigation As a Path to Consistent Application of the Bearden Standard

In response to these inconsistent and potentially unconstitutional methods of evaluating a defendant’s ability to pay fines and fees, the Lawyers’ Committee and other advocacy groups have filed lawsuits. In September 2015, the
Lawyers’ Committee and the law firm Orrick, Herrington & Sutcliffe joined Civil Rights Corp as co-counsel in a putative class action against thirteen judges of the Orleans Parish Criminal District Court and the Sheriff of Orleans Parish. Cain v. New Orleans alleged violations of the Fourteenth Amendment, Fourth Amendment, and wrongful imprisonment under Louisiana law. On August 3, 2018, after granting our motion for class certification, federal District Judge Sarah Vance issued her final judgment, declaring that the Fourteenth Amendment prohibits the detention of any individual for nonpayment alone, without a prior inquiry into ability to pay, and that the judges of Orleans Parish are incapable of fairly determining individuals’ ability to pay because they rely on the resulting collections to fund their court.

In August 2016, the Lawyers’ Committee, the ACLU of Arkansas, and a team of attorneys at Morrison & Foerster, filed a lawsuit in United States Court for the Eastern District of Arkansas against City of Sherwood, Pulaski County, the County DA, and District Judge Butch Hale. Dade v. City of Sherwood alleged violations of the Fourteenth Amendment, Sixth Amendment, Arkansas Constitution, and illegal (tax) exaction under Arkansas law. Plaintiffs sought declaratory relief for claims against the judge and injunctive and declaratory relief for claims against remaining defendants. The parties reached a settlement on November 13, 2017, ending operation of Sherwood’s “hot check” court. Among several broad reforms to Sherwood’s practices, the settlement requires the court to evaluate each defendant’s ability to pay before determining the person’s sentence.

Most recently, in August 2018, the Lawyers’ Committee and pro bono law firm Venable LLP, along with local firm Shults & Adams LLP, filed a lawsuit alleging that Arkansas District Court Judge Mark Derrick routinely jails poor people for nonpayment of court-imposed fines and fees, and automatically suspends driver’s licenses in violation of the Fourteenth Amendment. Mahoney v. Derrick further alleges that Judge Derrick’s “zero

WHEN MUST COURTS CONSIDER ABILITY TO PAY?

Successful litigation has established that assessment of ability to pay is required:

• Before drivers’ licenses are revoked: The U.S. District Court for the Middle District of Tennessee held in Thomas v. Haslam that a Tennessee statute that mandates the revocation of driver’s licenses for unpaid fines and fees is unconstitutional because it does not provide an exception from revocation for debtors whose failure to pay is based solely on their indigence. Enforcement of the statute has been stayed until the state lawfully adopts a process for providing an exception to revocation based on inability to pay.

• Prior to imprisonment for failure to pay court fines and fees: Similar to the Court’s holding in Cain v. City of New Orleans, the court in Commonwealth v. Smetana, a Pennsylvania state court case, ruled that an ability to pay inquiry must be made prior to imprisoning someone held to be in contempt for failure to pay court fines and fees.

• When revoking probation: In Fleming v. Missouri Board of Probation and Parole, the plaintiff’s (a defendant in a prior criminal proceeding) probation was revoked because he missed his payments and no inquiry was made into his ability to pay, his bona fide efforts to acquire resources to pay or alternative measures of punishment. The Supreme Court of Missouri held that the plaintiff’s due process and equal protection rights were violated when his probation was revoked without any inquiry as to his ability to pay.

• When denying defendants’ participation in a trial diversion program: In Mueller v. State, an Indiana state court held that payment of a fee as an absolute condition of participation in a trial diversion program discriminates against indigent appellants and violates the Fourteenth Amendment.

• When subjecting a person to a criminal conviction and a jail term for inability to pay a fine: The Mississippi Supreme Court held in Moody v. State of Mississippi that an indigent’s equal protection rights are violated when defendants can avoid prosecution by paying a fine, without determining an individual’s ability to pay the fine. The Court decided the remedy would be to determine an appropriate fine based on the defendant’s ability to pay, develop an appropriate payment plan for that fine plus restitution and to dismiss the charges if she complies.
tolerance” policy requiring individuals to make $100 monthly payments without consideration of their ability to pay, and his failure to promptly consider attorney appointment for indigent defendants, violate Arkansas law.

Lawsuits have also been filed in neighboring states, like Missouri. In 2015, Equal Justice Under Law, ArchCity Defenders, and the Saint Louis University School of Law filed class actions against the cities of Ferguson, Missouri, and Jennings, Missouri, arguing that the cities violated defendants’ constitutional rights by imprisoning them for failure to pay criminal justice debts they could not afford. In Fant v. City of Ferguson, the plaintiffs argued that the city repeatedly jailed defendants for being unable to pay fines owed from minor offenses, including traffic tickets, without first inquiring into their ability to pay and without considering alternative methods of punishment. In Jenkins v. City of Jennings, the Eastern District of Missouri ordered the Jennings Municipal Court to comply with practices that enable the court to conduct a proper assessment of an individual’s ability to pay fines. The Court approved a $4.7 million settlement after the plaintiff class of over 2,000 individuals alleged that the city routinely jailed individuals for failure to pay fines without ever inquiring as to whether the individuals were able to pay.

Several courts have recently provided guidelines for assessing a defendant’s ability to pay. In State v. Blazina, the Washington State Supreme Court held that in determining the defendant’s ability to pay, the sentencing courts must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. In addition, the Court stipulated important factors to consider when determining ability to pay, such as whether the defendant was incarcerated and the defendant’s other debts and suggested trial courts reference Washington’s civil fee waiver rule for additional guidance. In Skipper v. State, the Supreme Court of Mississippi held that an analysis of ability to pay requires evidence, and an analysis based solely on imputed wages rather than actual wages was reversible error.

Immediately prior to publication of this report, a unanimous ruling by the United States Supreme Court signaled new possibilities for advocates seeking to halt the proliferation of fines and fees. On February 20, 2019, the Court ruled in Timbs v. Indiana that the Eighth Amendment’s prohibition against excessive fines applies to the states under the due process clause of the Fourteenth Amendment, which makes it illegal to deprive a person of “life, liberty, or property without due process of law.”

Though the Timbs case centered on asset forfeiture, the Supreme Court specifically recalled the history of Black Codes within the Southern states, which used heavy fines to “punish crimes of even the slightest magnitude” and subject newly freed slaves to involuntary servitude through arrest and convict leasing. Accordingly, the Court found that the Eighth Amendment’s protection against excessive fines is both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” As discussed above, the Original Commentary on the Arkansas Fines Collection Law already makes clear that the Excessive Fines Clause of the Arkansas Constitution limits the power to impose fines.

**II. IMPLEMENTING POLICY REFORM**

In 2015, the Obama White House published a report discussing criminal justice debt and its disproportionate impact on the poor, suggesting that reforming fines and fees could potentially increase both equity and efficiency in the criminal justice process. The Civil Rights Division of the Department of Justice also published a “Dear Colleague” letter, outlining several major programs that provide resources to reform the assessment and enforcement of fines and fees.

The Office of Justice Programs Diagnostic Center’s publication of the “Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees” is also designed to help executive-level leaders make informed policy decisions and pursue sound strategies. Although former Attorney General Sessions withdrew the Fines & Fees Guidance, no legislation has been passed by Congress that would directly contravene the practices established by the Obama administration.86

As described below, certain states have begun implementing changes in the way fines and fees are being charged to defendants, in an effort to counter recent trends. In general, states have focused on four overarching areas of fines and
fees reform: conflicts of interest, poverty penalties and poverty traps, the ability-to-pay determination, and transparency and accountability.87

A. Conflicts of Interest

Courts and other government actors face conflicts of interest when they are both the agents who impose and enforce criminal justice debt and the persons who use the proceeds from debt obligations as revenue for their own operating budgets. Some states are addressing this issue by capping the contribution of court revenue to fund local operating costs. In January 2016, Missouri passed a new bill limiting revenue from non-traffic ordinance violations.88 Missouri also requires every county, city, town, and village to calculate annually the percentage of its annual general operating revenue received from fines, bond forfeitures, and court costs for minor traffic violations. If the percentage exceeds 20%, then the excess amount is sent to the Missouri Director of the Department of Revenue.89 Revenue caps have also been imposed in Oklahoma, Virginia and Florida.90

Other states are tackling the issue of indigent incarceration by working to realign the incentives of private probation companies and private debt collectors and moving towards a “performance incentive” funding model. In Pennsylvania, the Department of Corrections initiated performance-based incentive programs for halfway houses contracted by the state. In Illinois and California, probation agencies were rewarded with a share of prison cost savings when they revoked fewer probationers to prison for violations.92

B. Poverty Penalties and Poverty Traps

Debt owed because of offender-funded justice initiatives is particularly problematic for economically disadvantaged individuals because they can be trapped in an ongoing cycle of nonpayment and incarceration. Efforts have been made to study alternatives to incarceration and monetary sanctions and ensure that fees and fines do not become a poverty trap for economically disadvantaged people. For example, experiments with the day fines system—a system where financial penalties are imposed on a defendant based on his or her daily personal income—have been conducted at the municipal, county, and statewide level, both with and without statutory authority.93

Many states already authorize judges to impose community service as an alternative to incarceration, and some jurisdictions have also created community courts to ensure that defendants receive services in addition to appropriate sanctions, while increasing procedural justice.94 For example, Houston’s Homeless Court allows homeless defendants to fulfill their sentence’s requirements by participating in community service, counseling, computer or literary classes or job-search programs.95 When alternatives are provided, special care must be made to ensure access for people with disabilities.

Reducing or even forgiving fees and fines can be a helpful way to encourage fair collection practices. Some states, including California and Iowa, are creating amnesty programs designed to incentivize debtors to make any payments they can by enrolling in feasible payment plans and payment forgiveness programs.95 The same result can also be

“DEAR COLLEAGUE” GUIDANCE

(a) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;

(b) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

(c) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

(d) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

(e) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

(f) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(g) Courts must safeguard against unconstitutional practices by court staff and private contractors.
achieved through amending court rules. In 2016, the Supreme Court of Michigan enacted new court rules that guide Michigan judges in the exercise of their discretion to modify a debt by imposing a payment plan, modifying any existing payment plan or waiving all or a part of the amount of money owed.\textsuperscript{97} One other city (Philadelphia) has created a statute of limitations for the collection of debts due to court fees.\textsuperscript{98}

In addition to the generally applicable measures described above, some jurisdictions are giving special considerations for juveniles, as the imposition and collection of criminal justice debt presents unique challenges to juveniles.\textsuperscript{99} In Louisiana, the Orleans Parish Juvenile Court officially ended the practice of charging juvenile fines and fees.\textsuperscript{101} Alameda County, California recently repealed administrative fees that are charged to the families of juveniles in the criminal justice system. Further, the State of California is considering statewide legislation to prevent counties from charging these fees. Washington State also recently eliminated some juvenile justice system fees and fines.\textsuperscript{102}

C. Transparency and Accountability

In addition to the legal measures described above, transparency and accountability through third party monitoring would enhance the public’s understanding of how offender-funded justice operates and help address conflicts of interest.

One example of third-party oversight has been proposed in Missouri. The Missouri Supreme Court’s Municipal Division Work Group has recommended the creation of full-time professional staff positions in the Circuit Court of St. Louis County to evaluate whether the municipal courts are complying with Missouri statutes and court rules.\textsuperscript{103} Some states are also auditing their courts: the Virginia Auditor of Public Accounts has conducted special reviews of the courts’ collection system of unpaid fines and fees and the Michigan State Court Administrative Office outlines model collections practices and requires audits to verify the courts are in compliance.\textsuperscript{104}

Some states also impose reporting obligations on the courts and collect and publish data on criminal justice debt. Michigan requires the clerk of each court to report on the total number of cases in which costs or assessments were imposed, the total amount of costs or assessments that were imposed by the court and the total amount of costs or assessments that were ultimately collected by the court.\textsuperscript{105} South Dakota passed similar legislation in 2015.\textsuperscript{106} Georgia passed a bill to collect and publish data on private probation or debt-collecting companies in 2015.\textsuperscript{107}

In addition to reporting requirements, some states are publishing information on court fines and fees to increase knowledge and accessibility. For example, courts in North Carolina, Wisconsin, and Massachusetts are uploading schedules of fines and fees to their websites.\textsuperscript{108} In Texas, a recent law requires that criminal justice debt statements be issued to defendants to make them aware of the full range of fines and fees that may be applicable to them.\textsuperscript{109}

Finally, some states have established commissions to conduct research on the appropriateness and efficacy of fines and fees and to promote transparency and accountability. In 2016, the State of Illinois passed the Illinois Access to Justice Act, which created a Statutory Court Fee Task Force to review fines and fees imposed in civil and criminal cases.\textsuperscript{110} The Task Force released a report with its findings and recommendations.\textsuperscript{111} Similarly, the Massachusetts Special Commission to Study the Feasibility of Establishing Inmate Fees also serves as a successful model for evaluating the imposition of fees and fines by conducting a comprehensive study on the subject within the correctional system.\textsuperscript{112}
RECOMMENDATIONS

Defendants sentenced to pay LFOs are entitled to certain Constitutional protections that are often missing within Arkansas’s criminal justice system. As described above, a number of solutions are available to advocates, practitioners, judges, and policy-makers who want to improve the system and prevent the incarceration and punishment of Arkansans solely because they are poor.

Whether the ultimate solutions are gained through litigation or policy reform, the central focus is clear: Prior to punishment, courts must consider an individual’s ability to pay and make a finding—based on evidence—that the individual’s nonpayment was due to a willful refusal to obey the court’s order or failure to make good faith efforts to pay. Moreover, when a Court is considering an individual’s ability to pay in the context of probation revocation, “the State must prove by a preponderance of the evidence that the probationer inexcusably failed to comply with his payment obligation.”

Until those ultimate solutions are obtained, and in light of considerations raised within this report about the specific harms suffered by indigent persons as the result of prolific use of arrest warrants and driver’s license suspensions as method of enforcing payment of LFOs, we recommend the immediate adoption of two remedial measures to protect indigent defendants from unnecessary and unlawful penalties and punishments:

1. **End the practices of issuing arrest warrants, incarcerating (including through probation revocation), and suspending the driver’s licenses** of individuals for failing to pay fines and fees without affording Defendants notice that their ability to pay is a critical issue and providing them the opportunity to be heard during a proceeding where the court conducts an individualized “ability to pay” inquiry.

As discussed above, indigent defendants are often unlawfully incarcerated and subjected to driver’s license suspensions for failure to pay LFOs, without being provided a meaningful inquiry into their ability to pay. As such, courts should ensure that defendants who are sentenced to an LFO and alleged to have failed to pay according to the court’s order receive a show cause or compliance hearing before being penalized for nonpayment.

First, courts should send notice of the hearing by mail to the defendant’s home address, as well as via email, telephone call, and text message (where available and practicable). The notice should clearly indicate that it is not an arrest warrant, and that the defendant will not be subject to arrest or detention when she appears in court. At the hearing, the court should inquire into the defendant’s ability to pay and efforts to secure resources. The evidence submitted by the defendant concerning her ability to pay and efforts to secure resources, as well as the court’s findings and support for those findings, should be documented in writing. Moreover, courts should utilize objective criteria such as the Federal Poverty Guidelines (“FPG”) when considering whether a defendant has the ability to pay LFOs.

2. **Adopt judicial “bench cards” or similar resources detailing procedures for determining a defendant’s “ability to pay” in a manner consistent with the Arkansas Fines Collection Law, which defines “ability to pay” as “the resources of the defendant, including all available income and resources... sufficient to pay the fine and provide the defendant and his or her dependents with a reasonable subsistence compatible with health and decency.”**

Courts should also adopt bench cards that provide instructions to local judges when conducting ability to pay hearings. The purpose of these cards is to ensure that defendants are not unlawfully incarcerated for failure to pay LFOs.

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6 As a matter of public policy, the American Association of Motor Vehicle Administrators (AAMVA) opposes the suspension of driving privileges for non-highway safety reasons. The AAMVA advocates eliminating non-safety suspensions in order to “reduce the administrative burden on motor vehicle agencies (MVAs) and allow law enforcement to focus on drivers with safety-related suspensions.”

https://www.aamva.org/ReducingSuspendedDriversAlternativeReinstatementBP/
At a minimum, these bench cards should include information concerning: (1) a defendant’s right to be represented by legal counsel for defense against possible incarceration for failure to pay LFOs (or the right to court-appointed counsel at no cost to the defendant); (2) the criteria used by judges when determining a defendant’s ability to pay—including documentation concerning the defendant’s income, assets, and debts; and (3) the consequences that may result if the defendant is found to have willfully failed to pay an LFO—including penalties or incarceration.

Approved judicial bench cards in use in other jurisdictions could serve as a useful template for Arkansas courts.114 Consistent among approved judicial bench cards is the instruction that individuals meeting the following criteria are presumed unable to pay or unable to pay in full:

- Eligibility for appointed counsel; or
- Income at or below 200% of the poverty guidelines; or
- Full-time student; or
- Is, or within the past six months has been, homeless, incarcerated, or residing in a mental health or other treatment program; or
- Receiving means-tested public assistance.

These recommendations are consistent with provisions of the Arkansas Fines and Fees Law, which provides that “[a]bility to pay means that the resources of the defendant, including all available income and resources, are sufficient to pay the fine and provide the defendant and his or her dependents with a reasonable subsistence compatible with health and decency.” Moreover, they promote the purposes of the long-term strategic plan approved unanimously by the Arkansas Supreme Court in September 2018, which seeks to promote judicial independence by reducing reliance on court costs, fines, and fees.115
CONCLUSION

The rise of “offender-funded justice” in municipalities across the country has fed the phenomenon of mass incarceration, a major promoter of inequality within American society. The proliferation of LFOs imposed by the criminal justice system and associated with misdemeanor and low-level offenses have resulted in a “two-tiered” criminal justice system where those who can afford to pay escape the system, while those too poor to pay become trapped in a cycle of additional charges, additional fines, and seemingly endless possibilities for incarceration.

Even the United Nations has taken note of America’s need to curb the expansive use of fines and fees. The U.N. Special Rapporteur on Extreme Poverty found that the “use of the legal system, not to promote justice, but to raise revenue” has created a criminal justice system that “is effectively a system for keeping the poor in poverty” and is undermining democracy, “the foundation stone of American society.”

Accordingly, judges, advocates, and policy makers in Arkansas should make efforts to improve the criminal justice system and ensure that no person is incarcerated, suffers the loss of their driver’s license, or suffers any other penalty as the result of their inability to pay fines and fees. Beginning with implementation of two immediate and simple steps, actors within Arkansas’s criminal justice system can protect the rights of indigent defendants, mitigate the harmful effects that current LFO collection practices can have on indigent defendants, and restore confidence in the fairness of Arkansas’s criminal justice system.
3 Natapoff, Alexandra, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal (December 2018)
7 See Jill Lepore, I.O.U. How we used to treat debtors, The New Yorker (April 13, 2009), https://www.newyorker.com/magazine/2009/04/13/i-o-u (noting that smallpox and vermin were common features of debtors’ prisons and that “[j]ailers provided food, bedding and fuel for felons; [however] debtors were left to fend for themselves”).
8 An Act for the Relief of Certain Debtors, 4 Stat. 467 (1831) (as further amended in 1834).
9 Id.; Hager, supra n. 1.
10 399 U.S. 235 (1970) (holding that the Equal Protection Clause forbids imprisoning a convicted defendant for longer than the statutory maximum sentence solely due to the defendant’s indigency and failure to pay fines).
11 401 U.S. 395 (1971) (holding it a denial of equal protection to limit punishment to payment of a fine for those who are able to pay the fine, but to imprison those who are unable to pay).
12 461 U.S. 660 (1983) (holding that if a State may not then imprison a convicted defendant because he or she could not pay a legally mandated fine and that automatically revoking probation due to the nonpayment of fines is unconstitutional unless the State has first considered “adequate alternative” methods of punishment).
13a Id.
13b Id.
13c Id. at 673-74.
16 Sobol, supra note 1 at 491-92.
17 Sobol, supra note 1 at 501-02.
18 Id. at 500.
19 Id. at 501.
20 HLS POLICY REFORM GUIDE, supra note 2 at 5.
21 See Sobol, supra n. 28 at 510.
24 Bannon et al., supra n. 17.
25 See Shapiro, supra n. 19.
26 See Act No. 280 of 1975, §§ 1101-1104 (codified as Ark. Code Ann. §§ 5-4-201 to 5-4-204).
31 Id.
37 Id.
39 Id.
41 See BANNON ET AL., supra n. 17.
42 Id.
43 Id.
44 Id.
45 See Aspire Arkansas, Families: People Living In Poverty, https://www.aspirearkansas.org/families/people-living-in-poverty
51 Id. at p. 14.
53 Id.
54 Id.
55 Id.
Endnotes

61 Id.
72 Bearden, 461 U.S. at 672.
73 Id. at 672-3. ("Only if alternate measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.")
74 See Williams, 399 U.S. at 240-41, Tate, 401 U.S. at 398; Bearden, 461 U.S. at 667 ("The rule of Williams and Tate, then, is that the State cannot impose fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." (internal quotations omitted)).
75 Bearden, 461 U.S. at 667-72; see also Sobol, supra n. 28.
76 Id. at 672.
77 Id. at 674.
78 See Bannon et al., supra n. 17 at 21 (finding that “defenders in at least five of the surveyed states [Georgia, Illinois, Louisiana, Michigan, and Missouri] reported instances where they believed court had either failed to consider ability to pay all together or used an unreasonable standard for determining ability to pay in the process of revoking probation or parole.”). See also Sobol, supra n. 28 at 513. See Shapiro, supra n. 19.
79 See Shapiro, supra n. 19 (quoting Judge Robert Swisher of Benton County as saying he makes judgements about a defendant’s ability to pay based on how people present themselves in court, including whether they have an expensive jacket or tattoos).
80 Bearden, 461 U.S. at 662-3. While the Court described the defendant’s circumstances in reaching its decision, it left the determination of whether the defendant made sufficient bona fide efforts up to the lower court. Id. at 674. Instead of prescribing which factors to consider in this determination, the Court merely explained that “when determining initially whether the State’s penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.” Id. at 669-70. However, since Bearden v. Georgia, several courts have failed to take a comprehensive view of a defendant’s resources but have instead focused on extraneous factors in determining the defendant’s ability to pay. See Shapiro, supra n. 19.
Bearden, 461 U.S. at 674 (“We do not suggest by our analysis of the present record that the State may not place the petitioner in prison. If, upon remand, the Georgia courts determine that petitioner did not make sufficient bona fide efforts to pay his fine, or determine that alternate punishment is not adequate to meet the State’s interests in punishment and deterrence, imprisonment would be a permissible sentence. Unless such determinations are made, however, fundamental fairness requires that the petitioner remain on probation.”) On remand, the Court of Appeals of Georgia vacated its earlier judgment to imprison Bearden. Bearden v. State, 308 S.E.2d 63 (Ga. 1983).

See Shapiro, supra n. 19.

See Sobol, supra n. 28 at 514.

See White House Council of Econ. Advisers, Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor (December 2015), available at: https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf


See generally, CRIMINAL JUSTICE POLICY PROGRAM, supra n. 16.


Private operators who lowered recidivism rates were rewarded, while those who failed to do so had their contracts revoked. Pa. Dep’t of Corrs., Budget Request FY 15-16, Testimony before House Appropriations Committee (March 2015) available at https://www.cor.pa.gov/Documents/2015-2016%20DOC%20Budget%20Testimony.pdf


Allegra McLeod, Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law, 100 GEO. L. J. 1587 (2012).


Many young people have no way of earning money without negatively impacting their education, and criminal justice debt may undermine the rehabilitative goals of the juvenile justice system and push young people deeper into the criminal justice system. See CRIMINAL JUSTICE POLICY PROGRAM supra n. 16 at 24.


Supreme Court of Missouri, Municipal Division Work Group, Report to the Supreme Court of Missouri 18 (March 1, 2016), available at: https://www.courts.mo.gov/file.jsp?id=98093
Endnotes


106 S.D. Codified Laws § 1-55-16.


111 Id.


113 See, e.g., Stipulated Settlement Agreement and Retention of Jurisdiction at Appendix 1, Kennedy v. The City of Biloxi, Mississippi, No. 1:15-cv-00348-HSO-JCG, (S.D. Miss. Mar. 14, 2016) (“A defendant at or below 125% of the FPG without substantial liquid assets available to pay fines, fees, and costs will be deemed indigent.”) at 5.

114 Id. at Exhibit B

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