

## HOW THE USE OF FEES, FINES AND BAIL HAVE BEEN USED TO CRIMINALIZE POVERTY: CAN REFORMS HELP PUT THE GENIE BACK IN THE BOTTLE?

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**Abstract** The rallying cry of many American politicians is Law and Order. This tactic wins votes. As a result of its Wars on Crime, Drugs, and the Impoverished, America has the highest rate of incarceration in the world. This article explores how, over the past few decades, politicians have charged criminal defendants every imaginable fee and fine as they wind their way through the criminal justice system in order to fund the massive prison complex that the politicians do not want to tax Americans for. These tactics have criminalized poverty, as they disproportionately impact the most marginalized in American society. These abusive and unfair tactics have drawn scrutiny from policymakers in recent years, including the American Bar Association, which adopted stringent guidelines to help inform policymakers of this critical problem in an effort to reign in the abusive use of fees and fines. The paper discusses recent reforms, many at the urging of the Department of Justice, Office for Access to Justice, in conjunction with the ABA. It discusses the main Supreme Court cases that considered the Excessive Fines Clause of the Eighth Amendment.

**Keywords**

excessive criminal fees  
and fines,  
mass incarceration,  
prison reform,  
criminalization of the  
poor,  
eighth amendment  
jurisprudence,  
criminal justice reform

## 1 Introduction

Law and order. This is a phrase we hear repeatedly from politicians, policing agencies, and news reporters, among others. It broadly references the criminal justice system and acknowledges the fact that in a civilized society, there must be a set of laws, norms if you will, that regulate citizens' conduct to help ensure that our collective personal and property rights are protected. Without criminal laws and enforcement of those laws, society would be chaotic. Indeed, at any given time, there are pockets of the world where there is no meaningful law and order and where drug lords and gangs or terrorist organizations subjugate populations through intimidation. The recent situation in Port-au-Prince, Haiti's capital, is but one extreme example. There, since 2020, the Government of Haiti and Haitian security forces have struggled to maintain any semblance of law and order in the face of an ongoing gang war between two major criminal groups and their allies.

People in any country should rightly be concerned about the need for law and order. Ideally, no one should have to fear for their personal safety and protection of their property. And at the extreme, where lawlessness prevails, as in Haiti and, unfortunately, too many other places, chaos reigns. Fortunately, most countries in the Western world, including America, respect the rule of law and, while having their share of crime, live in relative peace. In other words, there is, in fact, law and order. Politicians, however, and some of those in the law enforcement community, too often use the law-and-order mantra as little more than a fear-mongering technique (or coded language) and pretext to secure votes and maintain their power (or the size of their budgets). There has never been any shortage of this strategy in American politics.

This article explores law and order in America from various perspectives. It starts by providing recent information on the nature and extent of criminal activity across America, addressing both violent and non-violent crime. It then delves into America's vast prison network, explaining the roles of public and private prisons and jails at both the federal and state levels. It next discusses the current rates of incarceration, addressing common myths about the impact that incarceration has on controlling crime, that is, on law and order. The paper then investigates the significant ways that the criminal justice system's imposition of fines and fees has shaped and informed the broader discussion of law and order. Here, the questions

addressed include the role that fines and fees play as forms of punishment for crimes. How fees and fines are used, not as forms of retribution, but rather as a funding mechanism to pay for America's vast prison complex. How fees and fines are used to keep people imprisoned, and to return them to prison once released. How fees and fines disproportionately impact the most vulnerable and marginalized members of society. The Eighth Amendment to the United States Constitution prohibits excessive fines. The article discusses that amendment and Supreme Court jurisprudence interpreting it. Serious reform efforts have been underway in recent years to claw back the criminal justice system's use of fees, fines and other forms of payment to fund the system, with many starting to realize the discriminatory and harmful nature of that approach. The article explores these reforms in depth and provides examples of measures that the states and local communities across America have taken to help rectify these long-standing abuses. The article ends with some conclusions and commentary from the author.

## **2 American Exceptionalism: First in the World in Prison Population**

American exceptionalism has been defined as meaning that the United States of America is unique and even morally superior for historical, ideological, or religious reasons (Mendelson, 2023). Indeed, on many levels America can boast of exceptionalism. By a wide margin, the United States has the best economy in the world (Smart, 2024). In 2022, America's GDP exceeded that of China, the second leading economy, by a whopping 40 percent, and was five times greater than the next two largest economies, Japan and Germany (Smart, 2024). The United States has the world's strongest military (Business Insider, India 2021). The United States far outspends other countries on its military; has more aircraft carriers (10) than any other country; has the most aircraft (nearly 14,000 as of 2021) (Business Insider, India 2021); and the world's 2<sup>nd</sup> largest nuclear arsenal (ICAN, 2024). The United States is widely regarded as having one of the best educational systems, especially at the university level, in the world (US News & World Report, 2024). It boasts some of the top universities in the world, including Stanford, Harvard, Yale, and Massachusetts Institute of Technology, to name but a few. Millions of people from around the world immigrate to America, viewing it as the land of opportunity. Your author, indeed, was fortunate to have been born in America and to have benefited from its economic and educational opportunities, among other things.

While America can indeed be justly proud of its economic prowess and military might; its educational system; its beauty; the leadership role it has historically taken on in the (democratic) world, among other things, there are, unfortunately, other areas where it has the dubious distinction of being exceptional for the wrong reasons. A recent study among 65 high-income countries found that in countries with populations over 10 million, the United States ranks first for rates of firearm homicides (Leach-Kemon, Sirull & Glenn, 2023). The authors of the study found that age-adjusted firearm homicide rates in the United States are 33 times greater than in Australia and 77 times greater than in Germany (Leach-Kemon, Sirull & Glenn, 2023). Gun violence accounts for over eight percent of deaths in America among those under age 20 (Leach-Kemon, Sirull & Glenn, 2023). New Hampshire is one of the smallest states, with only around 1.3 million people. Homicide rates there are relatively low as well, with 1.1 per 100,000 residents. Still, while New Hampshire has the lowest rates of age-adjusted firearm homicides in the United States, the survey revealed this still is three times greater than the highest rate in Europe – Cyprus, with 0.36 deaths per 100,000 (Leach-Kemon, Sirull & Glenn, 2023).

America's high rate of gun violence should come as no surprise. According to Data Pandas, the United States, by a large margin, stands out as the country with the highest rate of civilian gun ownership worldwide, with an estimated 120.5 firearms per 100 people (Data Pandas, 2024). Yemen came in a distant second at 52.8 firearms per 100 people (Data Pandas, 2024). Slovenia, where the author currently lives, in stark contrast, has an estimated 15.6 firearms per 100 people (Data Pandas, 2024). The United Kingdom has a lower rate yet, with 5.1 firearms per 100 people while South Korea is tied for "last place" (or perhaps we might say "first place" depending on one's point of view), with the Solomon Islands with 0.02 firearms per 100 people (Data Pandas, 2024). Curiously, while Canada geographically is contiguous to the United States, its rate of gun ownership stands at only 34.7 per 100 people, reflecting differing legislative and societal attitudes towards firearms (Data Pandas, 2024). While America had the 28<sup>th</sup>-highest rate of deaths from gun violence in the world: 4.31 deaths per 100,000 people in 2021, that was more than seven times as high as the rate in Canada, which had 0.57 deaths per 100,000 people – and about 340 times higher than in the United Kingdom, which had 0.013 deaths per 100,000 (Aizenman, 2023).

America also has an extraordinarily exceptional record of imprisoning its citizens, especially the poorest in society. Although the United States has only five percent of the world's population, it houses 25 percent of the world's prisoners (Jahangeer, 2019). Jahangeer, writing for the American Bar Association, the largest and most influential volunteer bar association in the United States<sup>1</sup>, reports that "in America approximately one in two adults has had an immediate family member incarcerated (for at least one night)" (Jahangeer, 2019). This translates to approximately 113 million people, or roughly one-third of the entire American population. Further, "[o]ne in seven adults has had an immediate family member spend at least one year in prison, and one in 34 adults has had an immediate family member spend 10 years or longer in prison. Today, an estimated 6.5 million people have an immediate family member currently incarcerated in jail or prison (1 in 38). There are currently more than 1.5 million people incarcerated in America" (Jahangeer, 2019). Between 1990 and 2014, incarceration rates increased by over 60 percent (Council of Economic Advisers Brief, 2015).

## 2.1 Mass Incarceration in the United States

The following pie chart explains where prisoners are housed in the United States as of 2024, along with the reasons for their imprisonment (Sawyer and Wagner, 2024).

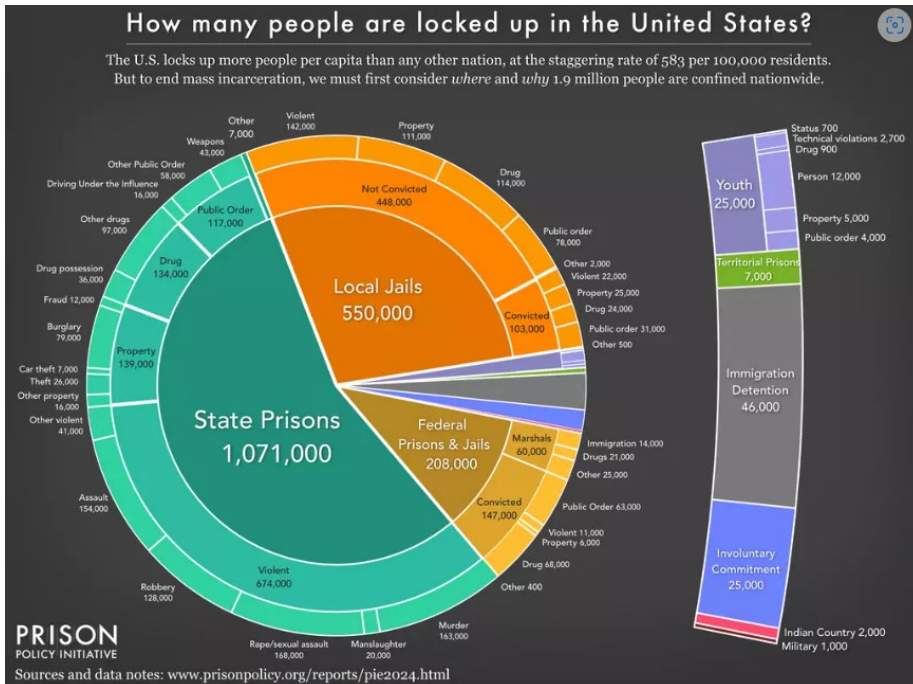
This pie chart (Picture 1) shows that the American criminal legal systems hold over 1.9 million people in 1,566 state prisons, 98 federal prisons, 3,116 local jails<sup>2</sup>, 1,323 juvenile correctional facilities, 142 immigration detention facilities, and 80 Indian country jails, along with military prisons, civil commitment centers, and state psychiatric hospitals (Sawyer and Wagner, 2024). Many Americans hold a sense of moral outrage that drug use has been over-criminalized. The pie chart shows, however, that "only" 13 percent of those in state prisons are incarcerated for drug-related crimes while 63 percent are incarcerated for various forms of violent crime.

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<sup>1</sup> In America, there are both voluntary and mandatory bar associations. To practice in a given state, in my case Michigan and Washington, lawyers are required to belong to the State Bar Association of that State. There are thousands of voluntary bar associations, most at the local levels: such as the Seattle-King County Bar Association in Washington State. The ABA is a nationwide, voluntary bar association. It sets policy for the American legal system; speaks on behalf of all American lawyers; helps with the continuing legal education of lawyers; sometimes submits Amicus briefs to courts in important cases, to name a few of its important functions.

<sup>2</sup> Prisons are facilities under state or federal control where people who have been convicted (usually of felonies) go to serve their sentences. Jails are city- or county-run facilities where a majority of people locked up are there awaiting trial (in other words, still legally innocent), many because they cannot afford to post bail. Your author was a civil, not a criminal lawyer. But he had to visit witnesses in jails on occasion. They are not pleasant places to be.

13 percent are in state prisons for property-related crimes, while 11 percent are incarcerated for public order crimes such as driving under the influence and wrongful possession of weapons. What is interesting about the state local jail population is that nearly 82 percent of those prisoners have not been convicted. On any given day, only about one hundred thousand of those jailed have actually been convicted.



**Picture 1: How many people are locked up in the United States?**

Source: Sawyer and Wagner, 2024

Sawyer and Wagner, writing for the Prison Policy Initiative, have written about various myths surrounding the American correctional system in their article entitled “Mass Incarceration: The Whole Pie 2024” (MI 2024). There has been public outcry in some circles over the privatization of the correctional system. In recent years private prisons have been constructed throughout the country and some have blamed them for mass incarceration. However, only eight percent of incarcerated people are held in private prisons (MI 2024). Accordingly, they constitute a relatively small part of a mostly publicly-run correctional system.

MI 2024 does highlight a significant problem in the American correctional system, and one that correlates to the issue of the criminalization of poverty through fees and fines, which is the central issue in this paper. The Thirteenth Amendment of the United States constitution, ratified in 1865, abolished slavery and involuntary servitude. However, it contains what some have called the “slavery loophole,” as there is an exception for “a punishment for crime whereof the party shall have been duly convicted.” The correctional system has capitalized upon this loophole to force those imprisoned to either perform work for no wages or for unconscionably low wages. An author writing on this topic tells the following story: “when prison reformer Johnny Perez was incarcerated he made sheets, underwear and pillowcases working for Corcraft, a manufacturing division of New York State Correctional services that uses prisoners to manufacture products for state and local agencies. His pay ranged between 17 cents and 36 cents an hour” (Sainato, 2022). Sainato, referencing a June 2022 report from the American Civil Liberties Union (ACLU), reports that around 800,000 prisoners in both the federal and state correctional facilities are forced to work, “generating a conservative estimate of \$11 billion annually in goods and services while average wages range from 13 cents to 52 cents per hour” (Sainato, 2022). Five southern states – Alabama, Arkansas, Georgia, Mississippi and Texas – force prisoners to work without pay (Sainato, 2022).<sup>3</sup> Many prisons actually charge their inmates for basic necessities such as personal hygiene items and medical visits. Accordingly, the small wages (if any) that these prisoners might receive end up going right back to the prison authorities (Sawyer and Wagner, MI 2024).

As the chart (Picture 2) shows, on any given day, over 360,000 persons are incarcerated in American prisons and jails for various drug-related offenses. According to the MI 2024 study, up until the Covid-19 pandemic, police were making over one million drug possession arrests per year. Many of those arrests led to convictions and sometimes prison sentences. Many drug arrests occur in so-called “over-policed communities,” those where the marginalized reside. Those persons end up with criminal records, “hurting their employment prospects and increasing the likelihood of longer sentences for any future offenses” (Sawyer and Wagner, MI

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<sup>3</sup> Colorado, Utah and Nebraska have amended their state constitutions to eliminate this prison-slavery loophole (Sainato, 2022). If rehabilitation earnestly is a goal of incarceration, then how does forcing those imprisoned to work either for free or for nominal sums advance that goal? Should the aim not be to better normalize those imprisoned so that when they are released into society they can function more effectively? It seems to your author that treating prisoners like animals is counter-productive to rehabilitation.

2024). Historically in the United States, it has been common practice to make felons ineligible to vote, in some cases permanently.



**Picture 2: 1 in 5 incarcerated people is locked up for a drug offense**

Source: Sawyer and Wagner, 2024

According to the ACLU, “A patchwork on state felony disenfranchisement laws, varying in severity from state to state, prevent approximately 5.85 million Americans with felony (and in several states misdemeanor) convictions, from voting” (ACLU, undated). In approximately eight states, people with felony convictions cannot vote. In approximately twenty states, people in prison cannot vote. In many other states, people with felony convictions can vote only upon completion of their sentence (ACLU, undated).

The state of Florida presents an example, however, of how fines and fees are criminalized and weaponized to limit peoples’ rights. According to the ACLU article on felony disenfranchisement laws, in Florida, those convicted of murder, or a felony sexual offense cannot vote and must still apply to the governor for restoration. Those convicted of other offenses have their voting rights automatically restored upon completion of their sentences (including parole and probation). However, in 2019, Governor DeSantis signed a law defining “completion of sentence” to include payment of certain restitution, fines, fees, and costs (ACLU, undated). Many poor, marginalized people who enter the criminal justice system do not have money. Their



poverty is often what leads to their criminal activities. Once in the system they will most assuredly be assessed fines, fees and court costs. As we have seen, most of those incarcerated cannot make much, if any, money while in jail or prison. Therefore, it can often be impossible for some to repay those fines, fees and court costs. This may well land them back in jail or prison and, in Florida, prevent them from being able to vote. Of course, in a conservative state such as Florida, that is the goal.



**Picture 3: Contrary to myth, people incarcerated for violent offences and released are least likely to be arrested again**

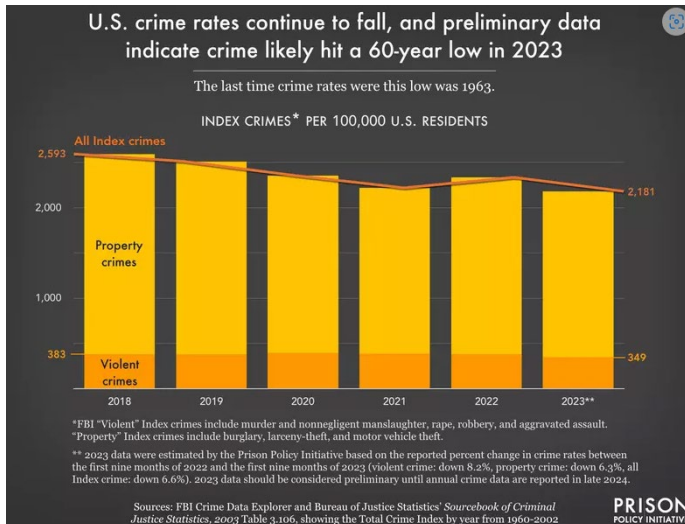
Source: Sawyer and Wagner, 2024

In the course of performing research for this article, one of the matters I found particularly interesting was data pertaining to recidivism, which is the tendency of a convicted criminal to reoffend. Referring again to the MI 2024 study, the researchers concluded that, “contrary to myth, people incarcerated for violent offenses and released are least likely to be arrested again” (Sawyer and Wagner, MI 2024). As the chart above shows, those convicted of the most violent crimes are the least likely to

reoffend. They are the least likely to be rearrested for any offense; least likely to be convicted again; and least likely to end up back in the prison system. Drug offenders and those convicted of public order offenses are those most likely to reoffend. Sawyer and Wagner concluded that at least one reason for the lower rates of recidivism among people convicted of violent offenses is their age, which is one of the primary predictors of violence. “The risk for violence peaks in adolescence or early adulthood and then declines with age” (Sawyer and Wagner, MI 2024). The myth then, according to these authors, is that many people in prison for violent or sexual crimes are not too dangerous to be released, with the caveat that such determinations still must be made on a case-by-case basis.

## 2.2 The Mythical, Politically-Charged War on Crime

Ever since I was a teenager growing up in Detroit, Michigan, I have heard politicians, especially those on the right, talk about the “War on Crime” (including as a sub-category, the “war on drugs”). So, I have heard the constant drum-beating for sixty years. The talk intensifies every four years, when Americans go to the polls to vote for President (at least those not prevented from voting due to say, a previous drug or other conviction).



Picture 4: U.S. crime rates continue to fall, and preliminary data indicate crime likely hit a 60-year low in 2023

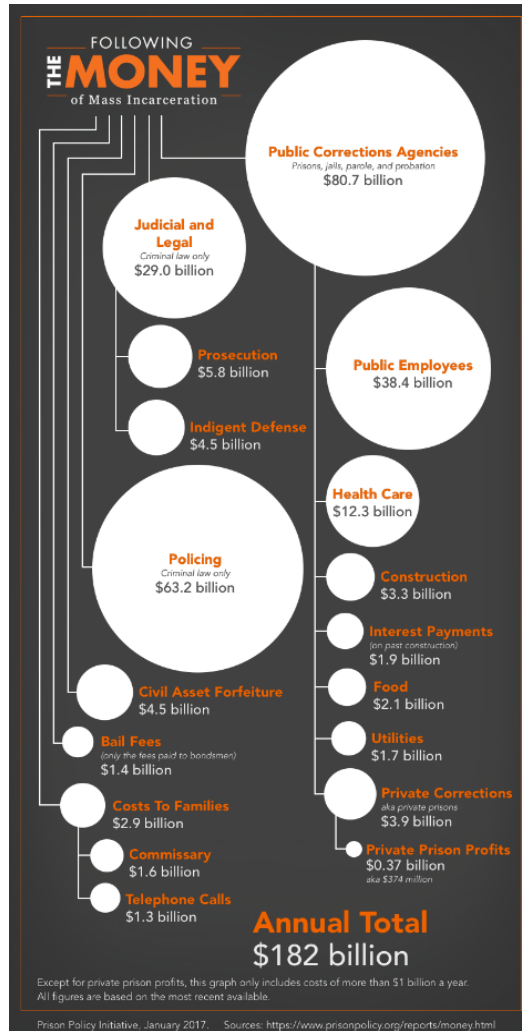
Source: Sawyer and Wagner, 2024

Citizens of course want law and order. We do not want to fear being mugged, or worse, when going outside. There are, in fact, places in America that are very dangerous. Typically, these are the poorest of the poor neighborhoods where there are street gangs dealing in drugs, usually as a way of making money, as they often have no other realistic prospects in life in a country where there are shockingly few safety nets (no guaranteed health care; no guaranteed education; no guaranteed housing or work; etc.). Another reality is, however, that many politicians pander to the fears of voters by exaggerating the extent of violent crime. According to MI 2024, “In general, violent crime has remained remarkably steady over the last 15 years; property crime has trended steeply downward and remains near historic lows (with the exception of auto theft). Overall, the crime rate appears to be the lowest it’s been since 1963” (Sawyer and Wagner, MI 2024). This same study concludes that politics helps to explain the ever-increasing jail and prison populations, as “many in law enforcement and on the right (and some Democrats, too) have rushed to blame recent reforms (such as bail reform, changes to police budgets etc.) for minor shifts in crime trends in an effort to resurrect the same ‘tough on crime’ policies that failed in the 1980s and 1990s” (Sawyer and Wagner, MI 2024). Interestingly, while those on the right espouse “Law and Order” the most, and claim that so-called Blue States (Democratic-run) are “soft on crime,” evidence shows that murder rates were an average of 40 percent higher in Red States (Republican-run) compared to Blue States in 2000, and, more broadly, murder rates over the years 2000-2020 were 23 percent higher on average in Red States (Sawyer and Wagner, MI 2024). These authors conclude that “while crime rates remain near historic lows, what has actually changed most is the public’s perception of crime, which is driven less by first-hand experience than by the false claims of reform opponents. These false claims are deliberately stoked to undo the hard-won, evidence supported, common sense reforms that have only begun to put a dent in mass incarceration” (Sawyer and Wagner, MI 2024).

### **2.3 The Cost of Mass Incarceration**

The costs associated with America’s vast prison system are mind-numbing. A comprehensive study performed by the Prison Policy Initiative in 2017 found that America’s system of mass incarceration costs the government at least 182 billion

dollars a year (Wagner and Rabuy, 2017).<sup>4</sup> The following chart provides a breakdown of the various cost items.



**Picture 5: Following the Money of Mass Incarceration**

Source: Wagner and Rabuy, 2017

<sup>4</sup> The Council of Economic Advisers in its Brief dated December 2015 states this number is even higher. “Between 1993 and 2012, total real annual criminal justice expenditures grew by 74 percent from \$157 to \$237 billion, and local spending comprised approximately half of total expenditures. State corrections expenditures represent 7 percent of total State general funds on average, and 11 States spent more on corrections than higher education in 2013.” (CEA, 2015, p. 2).

To give this number some perspective, the gross national product of Slovenia in 2022 was approximately \$60 billion; in Croatia was approximately \$70 billion; and in Slovakia was around \$115 billion (The World Bank, 2024).

### **3 Court Fines, Fees and Costs – The Criminalization of Poverty**

#### **3.1 Introduction**

For those in society that are either very well-off or relatively well-off, and have a decent job and a decent income, we do not give a second thought to walking into a café or restaurant and ordering a drink and something to eat. We can take our car to the petrol station and fill the tank up with fuel and perhaps throw in another ten dollars or so for a wash. We can pay with a credit card (most of us have one or more) if we do not happen to have cash on us. Or, we can go to the nearest bank machine and withdraw some funds. But the sad truth is that many in America do not fit into this category. For the value of money is different to those in different socio-economic strata.

The Census Bureau estimated that in 2021, 11.6 percent of Americans – roughly 38 million people – lived at or below the poverty level. That year, the poverty level threshold was \$27,740 for a family of four and \$13,788 for an individual (USA Facts, 2023). A Census Bureau survey conducted in July 2023 showed that over one-third of Americans found it somewhat or very difficult to pay for their usual household expenses (USA Facts, 2023). Many among the poorest American citizen's do not own a place to live, a car, have a savings account, a credit card, a television, a computer, a mobile phone and may not even have a job. The expression in America is they live hand to mouth. Theirs is a day by day, if not hour by hour, existence. Though it has been called the Land of Opportunity, the fact of the matter is that there are few social nets in America. America does not have an Economic Bill of Rights. Now, and for all of its history, despite its overall economic prosperity, there are too many people that live at the very margins of American society. Although former President Franklin Delano Roosevelt proposed an Economic Bill of Rights for all Americans, that never was adopted, there being too much opposition to it.<sup>5</sup>

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<sup>5</sup> Roosevelt was America's 32<sup>nd</sup> President, serving from 1933 until his death in 1945. He is widely regarded as one of America's greatest presidents. Bernie Sanders, long-serving US Senator from Vermont, and past aspirant for the Democratic presidential nomination, has proposed an Economic Bill of Rights. He ran a strong campaign for the

Economic freedom in America is weaponized by politicians, as is the case with so many important issues, such as guns, abortion, immigration, crime etc. Many politicians and others look down upon social welfare. For these unfortunate members of society, ten or twenty dollars is a lot of money. The unfortunate truth, and I must say the sad and sorry state of affairs, is that politicians (and others) in the past and the present exploit the dire economic situation of these people to obtain and retain their grip on power.

The tactics often change. But the game is the same. Impose taxes, fees or fines on the marginalized in order to strip them of their rights. In the late 1800s, after the American Civil War, fought to end slavery, southern states across what was the former Confederacy imposed a variety of laws designed to restrict the civil liberties of the “newly-freed” African American population. Although the Fifteenth Amendment, passed in 1870, granted African American men the right to vote, lawmakers in the south passed legislation that restricted their right to vote. “One of the many discriminatory methods was the poll tax, which required voters to pay a fee in order to enter the polling places to cast their ballots. Due to the disproportionate levels of poverty among African Americans in the southern states, many of them – as well as poor Whites – were excluded from voting” (Ronald Reagan National Archives). In 1964, the Twenty-fourth Amendment was ratified, prohibiting both the federal Congress and the states from conditioning the right to vote in federal elections on payment of a poll tax or other types of tax.<sup>6</sup> Two years later, in 1966, the Supreme Court in *Harper v. Virginia State Board of Elections*,<sup>7</sup> held that poll taxes for any level of elections were unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.

Just as politicians used the poll tax to effectively disenfranchise (mainly) poor Blacks, but also others living on the margins of American society, so too have they used fees, fines and costs in the criminal justice system to help fuel the mass incarceration discussed in Section One of this paper. These tactics are discussed next.

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2020 election, garnering widespread support for his progressive agenda, but in the end bowed out to give way for current President Joe Biden. For those interested in this topic I can recommend Sander’s New York Times Bestseller book entitled *It’s OK to be Angry About Capitalism*. (2023).

<sup>6</sup> At the time five states still retained a poll tax: Alabama, Arkansas, Mississippi, Texas and Virginia.

<sup>7</sup> *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

### **3.2 Tactics to Criminalize Poverty (and often to disenfranchise) and to pay for the Criminal Justice System (Law and Order)**

“Throughout its history, the United States has criminalized low-level behavior, often in racist ways. Our criminal legal system was set up to enforce slavery and has been used ever since to over-police and over-arrest people of color, especially Black people.” (Vera, undated).

Mass incarceration, as we have seen, is extremely costly. It is one thing to say, “we want more Law and Order.” It is another to pay for it. I would posit the following theory. If we were to develop a questionnaire and ask respondents to state whether they agree that one of government’s top priorities should be to ensure safety in society, that is, law and order, probably close to one hundred percent would agree. However, no one likes paying taxes, or having local levies enacted, such as to increase property taxes, so as to raise revenue for local spending. So, in our hypothetical questionnaire, if we were to ask respondents how government should spend revenues generated through tax and levy receipts, I have a strong suspicion a very low percentage would advocate spending more (or raising tax rates) to fund jails and prisons. Most people would rather see more “tangible” results from government’s use of their tax money, such as better roads, better schools, better immigration control, better health care, etc.

The Council of Economic Advisers issued a Brief in December 2015, entitled “Fines, Fees, and Bail. Payments in the Criminal Justice System that Disproportionately Impact the Poor” (CEA, 2015). The CEA Brief succinctly describes the problem: “Crime imposes real costs on society in terms of both the harm done to victims and in resources that must be allocated to policing, prosecution and incarceration. Increases in criminal justice spending have put a strain on local criminal justice budgets and led to the broader use of fine penalties and itemized criminal justice fees in an effort to support budgets. However, this practice places large burdens on poor offenders who are unable to pay criminal justice debts and because many offenders assigned monetary penalties fall into this category, has largely been ineffective at raising revenues” (CEA, 2015: 1). The CEA Brief describes the three broad categories of monetary payments utilized in America’s criminal justice system to help fund it.

The first type is fines, which are monetary punishments for infractions, misdemeanors or felonies. “Fines are intended to deter crime, punish offenders, and compensate victims for losses” (CEA, 2015: 1). Fees are itemized payments for court activities, supervision, or incarceration charged to defendants determined guilty of infractions, misdemeanors or felonies. Fee collections, the second category, are intended to support operational costs in the criminal justice system and may also be used to compensate crime victims for losses. Fees may also have a punitive and deterrent purpose (CEA, 2015: 1). The third type is bail, which is a bond payment for a defendant’s release from jail prior to court proceedings. The majority of a bail payment is returned to a defendant after case disposition, assuming the defendant appears for the required court hearings. Bail payments are intended to incentivize defendants to appear at court and, in some cases, to reduce the criminal risk of returning a defendant to the community (CEA, 2015: 1).

According to the CEA Brief, the ever-rising criminal justice budgets motivated policymakers (especially starting in the early 1990s) to accelerate the use of fines and fees to help cover the escalating costs of the system (CEA, 2015: 2). They advanced the common-sense, if overly simplistic, argument that criminals, and not taxpayers, should bear the primary burden of covering these increasing costs, and that this policy would have a deterrent effect. Whether imposing fines and fees will deter criminal behavior is highly questionable. However, what is clear is that the system’s use of these monetary payments fails to account for a defendant’s ability to pay them “and instead are determined based on offense type, either statutorily or through judicial discretion” (CEA, 2015: 1). These payments are regressive, and more punitive for the poorest members of society, those that are most likely to be involved in the criminal justice system in the first place. And here is the crux of the problem with policymakers relying on these monetary payments to fund the criminal justice system. As succinctly stated in the CEA Brief, “The disproportionate impact of these fixed payments on the poor raises concerns not only about fairness, but also because high monetary sanctions can lead to high levels of debt and even incarceration for failure to fulfil a payment. In some jurisdictions, approximately 20 percent of all jail inmates were incarcerated for failure to pay criminal justice debts. Estimates indicate that a third of felony defendants are detained before trial for failure to make bail. High debt burdens for poor offenders in turn increases barriers to successful re-entry [into society] after an offense” (CEA, 2015: 1).



States have been very creative in the categories of financial obligations they impose. They seem to have adopted the model that financial institutions and airplane carriers use to squeeze every last dollar from their respective customers. Similar to airlines that now charge for any drinks or food during flight, or extra baggage, or overweight baggage, seats with more leg room, priority boarding, to have a spare seat next to you and the like,<sup>8</sup> financial obligations adopted by states “include charges for representation by a public defender, court appearances, room and board for jail and prison stays, parole or probation services, court-required drug testing, counseling or community service, and electric monitoring” (CEA, 2015: 3). Florida, which has been particularly aggressive, has added twenty new categories for financial obligations since 1996 (CEA, 2015: 3).

The State of Washington, which, on balance, is one of the more progressive states in the union, has not been immune from the race to adopt a menu of fines and fees to pay for its criminal justice system. There, “individuals with criminal justice debt are subject to an initial flat charge of \$500 and an interest rate of 12 percent. Other States assess fees ranging from \$25 to \$300 for late payments, failure to pay fines or to set up a debt payment plan. In Florida, private collection agencies may add processing fees of up to 40 percent” (CEA, 2015: 3). A study from the State of Washington revealed criminal justice defendants owed an average of \$1,406 in fines and fees. Non-violent drug offenders owed debts over one-and-a-half times greater than other offender groups, in part because drug offenders may be more likely to receive fines instead of incarceration sentences. With the twelve percent interest rate added, a Washington state offender paying \$10 a month on the average debt would owe more than \$15,000 in 30 years (Beckett, Harris & Evans, 2008: 19-25). Some fines and fees seem small at first glance, but they can add up quickly, and continue to mount when interest is added, and these charges can pose significant and sometimes overwhelming obstacles to poor offenders.

Jahangeer reports that in 44 States and the District of Columbia, defendants can be billed for a public defender. 41 States charge inmates room and board for jail and prison stays. 44 States bill offenders for their own probation and parole supervision.

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<sup>8</sup> According to CNN travel (Macquire, 2013), baggage fees alone were worth more than \$3.3 billion to the American aviation industry in 2012, while fees for reservation changes netted them 2.38 billion in 2011, according to the Bureau of Transportation Statistics that the CNN article cites.

All States except Hawaii and the District of Columbia bill defendants for electronic monitoring devices when they are ordered to wear them.

Teigen (2020: 2), citing Alabama research, which surveyed nearly 1,000 residents from 41 counties about their experience with court debt, found: 83 percent gave up necessities like rent, food, medical bills, car payments and child support in order to pay down their court debt; 50 percent had been jailed for failure to pay court debt; 44 percent had used payday loans to cover court debt; 38 percent admitted to committing a crime to pay off court debt; 20 percent were turned down for a diversion program like drug court because they could not afford it; and, 66 percent received money or food assistance from a faith-based charity or church that they would have not have had to request if it were not for their court debt.

### **3.3 These a' la Carte Menu of Charges are Regressive and Disproportionately Impact the Marginalized Members of Society.**

The CEA Brief again states the problem particularly well. “While fines and fees serve different purposes in the criminal justice system, with the former intended as a direct form of punishment and the latter intended as a form of cost-sharing for operation of the system, they have a key similarity in the fact that both are typically assessed without consideration of the offender’s ability to pay. These monetary penalties often place a disproportionate burden on poor individuals who have fewer resources available to manage debt. They also serve as a regressive form of punishment as the same level of debt presents an increasingly larger burden as one moves lower on the income scale” (CEA, 2015: 3).

In addition to the large, and often insurmountable financial burden they create, fines and fees also impose other insidious human costs on poor offenders. As with the poor family that must choose between food and clothing, “high fines and fee payments may force the indigent formerly incarcerated to make difficult trade-offs between paying court debt and other necessary purchases. Unsustainable debt coupled with the threat of incarceration may even encourage some formerly incarcerated individuals to return to criminal activity to pay off their debts, perversely increasing recidivism” (CEA, 2015: 4). The failure to pay a fine or fee is a criminal offense, adding to the offender’s criminal record, making it more difficult to find work. The CEA Brief points out that its research revealed that many States surveyed

suspend driver's licenses<sup>9</sup> for nonpayment of criminal justice debt, making it even more difficult to find and maintain employment, and thereby "increasing the obstacles to paying off debt" (CEA, 2015: 4).

As both the usage and amounts of fines and fees charges have increased over the past few decades so has the use and amounts of bail bonds. This, too, has disproportionately impacted the poorest in society. The increased use and size of bail payments has resulted in the marginalized being detained for court hearings and trial more frequently. "For example, in New York City in 2010, only 21 percent of arrestees made bail at arraignment for bail amounts less than \$500. Similarly, in Virginia in 2012, 92 percent of defendants were held on bail bonds set below \$5,000" (CEA, 2015: 6). The CEA Brief found that regressive bail policies lead to "systematically higher levels of bail for Black defendants relative to White defendants, even when controlling for offense type and defendant characteristics" (CEA, 2015: 7). This is partly because, as with fines and fees, when setting bail, the courts usually fail to consider the defendant's ability to pay, which predictably disproportionately burdens low-income defendants. Theoretically, the purpose of bail bonds is to ensure the defendant who is let out of jail pending hearings returns for those hearings. If the judge, at the bond hearing, deems a defendant too dangerous to be set free in society, bail will be denied. These are reasonable policy goals. The problem is that the bail practices described above often result in courts detaining the poorest rather than the most dangerous or those that are unlikely to return to court for their obligations. This is not justice and is morally wrong.

### **3.4 The American Bar Association's Position on the use of Fees, Fines and Other Charges that Criminalize Poverty**

The ABA has taken a leading role in shining a spotlight on what it calls this "National Crisis" (Jahangeer, 2019). Writing for the ABA, Jahangeer provides the following poignant examples of how the American criminal justice system has criminalized poverty. "In April of 2016, a 30-year-old woman from St. Louis was accused of stealing a tube of mascara from a Walmart and was arrested for shoplifting. She said

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<sup>9</sup> According to the Fines & Fees Justice Center, half of all States suspend, revoke or refuse to renew driver's licenses for unpaid traffic, toll, misdemeanor and felony fines and fees. As a result, millions of people are struggling to survive with debt-related driving restrictions just because they could not afford a court fine or fee or because they missed a court hearing. (FFJC, 2022).

that she threw away the package and forgot to pay the \$8.74 for the mascara. She served jail time, received a fine and was put on probation. When she did not appear at a probation hearing, she was sent back to jail. She fell behind on payments and was sent to jail again. Her board jail bill is now more than \$10,000” (Jahangeer, 2019). What kind of system imposes these high levels of fines over a tube of mascara worth less than \$10? Another example: “[A] Missouri woman was arrested for stealing nail polish from a Walmart. She pleaded guilty to a misdemeanor and was sentenced to 30 days in jail. The nail polish cost \$24.29. After her jail time, she received a bill for \$1,400 for room and board. She could not afford the board bill and was put in jail again – this time, the bill totaled \$2,160” (Jahangeer, 2019). Then there is the story of a poor 61-year-old Black man in New Orleans who is trying to repay thousands of dollars in court costs and restitution for writing a bad check. He had to often shut off water and other utilities because his failure to make monthly payments to the court could send him back to jail, where he would incur yet more debt (Jahangeer, 2019).

Jahangeer reported that nearly two-thirds of American prisoners have been assessed court fines and fees. Most Americans going through the criminal justice system are not highly educated, with about 65 percent not having even graduated from high school. Somewhere between 15 to 27 percent of those released from incarceration have nowhere to call home and so are resigned to a homeless shelter, or worse.<sup>10</sup> And, as many as 60 percent remain unemployed a year after release (Jahangeer, 2019). If America really is morally exceptional, should it not do better than this?

In 2018, the ABA House of Delegates<sup>11</sup> formally adopted as policy that it called the *ABA Ten Guidelines on Court Fines and Fees* (ABA Guidelines, 2018: 1-15). The Guidelines were meant to provide practical direction for government officials, policymakers and others charged with developing, reforming and administering court fines and fees. The purpose of the Guidelines was to help ensure that fines and fees are fairly imposed and administered and that the justice system does not

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<sup>10</sup> I have often heard politicians, members of the media, and others refer to people that have literally nowhere to go and are forced to sleep in parks, or on the side of the road as “sleeping rough.” This makes it sound as if these unfortunate people are making a choice. They are not. A wealthy country such as America can certainly build housing for these people so that they do not have to live in the elements.

<sup>11</sup> The House of Delegates is the legislative body of the ABA. It formulates policy and adopts rules consistent with the ABA’s Constitution and Bylaws. The ABA has many hundreds of delegates, that are elected from all of the American States.

punish people for the “crime” of being poor. The following is a summary of these Guidelines.

Guideline One “Limits to Fees”, provides in part that any fees imposed should never be greater than an individual’s ability to pay or more than the actual cost of the service provided. Further, no law or rule should limit or prohibit a judge’s ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause substantial hardship. The ABA opposes many such fees on the basis that “the justice system serves the entire public and should be entirely and sufficiently funded by general government revenue” (ABA Guidelines, 2018: 2). In connection with Guideline One, the official commentary states, “When an individual is unable to pay, courts should not impose fees, including fees of counsel, diversion programs, probation, payment plans, community service, or any other alternative to the payment of money. An individual’s ability to pay should be considered at each stage of proceedings, including at the time the fees are imposed and before the imposition of any sanction for nonpayment of fees, such as probation revocation, issuance of an arrest warrant for nonpayment, and incarceration. The consideration of a person’s ability to pay at each stage of proceedings is critical to avoiding what are effectively ‘poverty penalties,’ *e.g.*, late fees, payment plan fees, and interest imposed when individuals are unable to pay fines and fees” (ABA Guidelines, 2018: 2).

Guideline Two “Limits to Fines”, provides that fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge’s ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship. As with fees, fines should be calibrated to reflect the individual’s financial circumstances, and the individual’s ability to pay fines should be reassessed at every stage of the proceedings (ABA Guidelines, 2018: 3).

Earlier, we discussed how criminal courts have suspended or even revoked offenders’ driver’s licenses for nonpayment of fees and fines. Guideline Three addresses this vital issue. Its title reads, “Prohibition against Incarceration and Other Disproportionate Sanctions, Including Driver’s License Suspensions” (ABA Guidelines, 2018: 3). The Guideline states that a person’s inability to pay a fine, fee

or restitution should never result in incarceration or other disproportionate sanctions. The commentary to Guideline Three states, “Despite the popular belief that ‘debtors prisons’ have been abolished in the United States, people are still incarcerated because they cannot pay court fines and fees, including contribution fees for appointed counsel . . . Fines and fees that are not income-adjusted (*i.e.*, are not set at an amount the person reasonably can pay) are regressive and have a disproportionate, adverse impact on low-income people and people of color. For these and other reasons, incarceration and other disproportionate sanctions, including driver’s license suspension, should never be imposed for a person’s inability to pay a fine or fee” (ABA Guidelines, 2018: 4-6).<sup>12</sup>

The Fourth Guideline, “Mandatory Ability-to-Pay Hearings,” advocates mandatory ability-to-pay hearings, stating that “Before a court imposes a sanction on an individual for nonpayment of fines, fees, or restitution, the court must first hold an ‘ability-to-pay’ hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration” (ABA Guidelines, 2018: 7). In its commentary, the report refers to *Bearden v. Georgia*,<sup>13</sup> where the U.S. Supreme Court ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual’s ability to pay and making a finding that the failure to pay was “willful.”<sup>14</sup> The *Bearden* case followed a line of earlier cases<sup>15</sup> in which the Supreme Court had attempted to clarify that individuals who are unable to pay a fine or fee should not be incarcerated for that failure. The commentary points out that forty years after *Bearden* the problem persists (ABA Guidelines, 2018: 7-8).

Earlier in this paper, I highlighted how people incarcerated typically lose their right to vote, at least for felony convictions. Most States reinstate that right at some point

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<sup>12</sup> The Commentary supports the ABA’s position on the grounds that “People who are prohibited from driving often lose their ability to work or attend to other important aspects of their lives” which in turn “can lead to a cycle of re-incarceration” and its insidious consequences, such as mountains of additional debt and misery (ABA Guidelines, 2018: 6).

<sup>13</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983).

<sup>14</sup> *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).

<sup>15</sup> See, e.g., *Williams v. Illinois*, 399 U.S. 235 (1970) (holding that an Illinois law requiring that an individual who was unable to pay criminal fines “work off” those fines at a rate of \$5 per day violated the Equal Protection clause of the Fourteenth Amendment because the statute “works an invidious discrimination solely because he is unable to pay the fine”); *Tate v. Short*, 401 U.S. 395 (1971) (“Imprisonment in such a case [of an ‘indigent defendant without the means to pay his fine’] is not imposed to further any penal objective of the State. It is imposed to augment the State’s revenues but obviously does not serve that purpose [either]; the defendant cannot pay because he is indigent.”).

after the sentence has been fulfilled. But here is the problem with some States' approach. Many legislators in so-called Red States are constantly exploring ways and means to prevent people (*i.e.*, Democratic-leaning people, often poor, people of color etc.) from casting votes. Since the Twenty-Fourth Amendment abolished the poll tax, these States have had to derive alternative means to prevent people from voting. They have had no shortage of ideas, including gerrymandering of election districts; limiting voting hours and days; not backing mail-in ballots, but instead demanding in-person voting; limiting the number and places of polling stations; requiring proof of identity such as a driver's license (even though poor people often do not have such identification and cannot afford to drive) etc. The list of ideas is endless.<sup>16</sup> As I wrote earlier, Florida Governor DeSantis, always trying to "one-up" former President Donald Trump in the populism battle (AKA MAGA) in order to shill for conservative votes, helped pass laws extending the tails of when a sentence ends by making them include payment of all fines, fees and costs plus interest. Very clever, indeed. An ingenious "in-the-back-door" method of ensuring that many convicted offenders' sentences never really come to an end, and forever disenfranchising them. Think about the political consequences of mass incarceration, especially impacting the poor, those who often vote progressive, and then depriving those persons of the right to vote. We have seen how close national Presidential elections are in the United States. Disenfranchising millions of Americans using these tactics can easily impact the outcome of who becomes President; Senator; the next batch of Supreme Court Justices; and, inferior court federal judges.<sup>17</sup>

ABA Guideline 5 recognizes such tactics for what they really are: discriminatory and invidious. Titled, "Prohibition against Deprivation of other Fundamental Rights," this guideline states that the failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote (ABA Guidelines, 2018: 8). The official commentary points out that States besides Florida, including

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<sup>16</sup> According to the American Civil Liberty Union (2021), "in recent years more than 400 anti-voter bills have been introduced in 48 states. These bills erect unnecessary barriers for people to register to vote, vote by mail, or vote in person. The result is a severely compromised democracy that doesn't reflect the will of the people."

<sup>17</sup> The Presidential election between George W. Bush (Republican) and Al Gore (Democrat) in 2000 was one of the closest and most contentious in American history. There were vote tallying inconsistencies, especially in Florida and the matter ended up in the U.S. Supreme Court, where calls for a recount were rejected, handing the election to Bush, who won the electoral college with 271 votes to Gore's 266, but lost the popular vote by 500,000. In 2016, Donald Trump prevailed over Hillary Clinton with 304 electoral college votes to Clinton's 227. However, the popular vote told a different story, with Clinton winning almost 3 million more votes than Trump. In 1960, John F. Kennedy prevailed over Richard Nixon; barely. Kennedy won but with only 120,000 more votes.

Georgia, require payment of all outstanding court fines and fees before a person convicted of a felony can regain the ability to vote. In other States, reported nonpayment or willful nonpayment of fines and fees can lead to a revocation of voting rights<sup>18</sup> (ABA Guidelines, 2018: 9).

The ABA's Guideline 6 is Titled, "Alternatives to Incarceration, Substantial Sanctions, and Monetary Penalties," proposes that court's faced with people that are unable to pay fines or fees consider alternatives to (re)incarceration (ABA Guidelines, 2018: 10). Further, any alternatives imposed must be both reasonable and proportionate to the offense. The commentary argues that the goals behind fines, to punish and deter, often can be achieved by alternatives to incarceration and disproportionate sanctions like driver's license suspension. Referring to the *Bearden* decision, the commentary states, "Reasonable alternatives include: an extension of time to pay; reduction in the amount owed; and waiver of the amount owed. Frequently, the most reasonable alternative to full payment of a fine that a person cannot afford is a reduction of the fine to an amount that an individual can pay" (ABA Guidelines, 2018: 10).

Guideline 7 is Titled, "Ability-to-Pay Standard," and enunciates a multifactorial ability-to-pay standard which should be "clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person's ability to pay; and whether payment would result in manifest hardship to the person or dependents" (ABA Guidelines, 2018: 11). The commentary recommends that all actors in the criminal justice system should be trained in the standards used in their jurisdiction to determine ability to pay and the constitutional protections for people who cannot afford to pay court-ordered financial obligations (ABA Guidelines, 2018: 11).

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<sup>18</sup> In Washington state, failure to make three payments in a twelve-month period can lead to a revocation of voting rights. The court can also revoke voting rights if they determine that a person has willfully failed to comply with the terms of payments. (ABA Guidelines, 2018: 9, fn. 28).



Guideline 8 “Right to Counsel” comprehensively deals with right to counsel and provides that “An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted unless the waiver is knowing, voluntary and intelligent, and the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences” (ABA Guidelines, 2018: 11).

Guideline 9 “Transparency” deals with transparency, and provides that information concerning fines and fees, including financial and demographic data, should be publicly available (ABA Guidelines, 2018: 13).

Finally, Guideline 10 is concerned with collection practices. It provides that any public or private entity authorized to collect fines, fees, or restitution should abide by the Guidelines and that any contract with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise incentivizing harmful behavior. Contracts awarded to collection agencies should include some mechanism for compliance with these prohibitions (ABA Guidelines, 2018: 14).

For the reader that wants more details about these Guidelines, and their importance to America’s criminal justice system, I commend you to read the full Report that follows the actual Guidelines (ABA Report which follows the Guidelines, 2018: 1-6). In this article I have attempted to discuss most of the arguments and concerns that are set forth in this ABA Report. The ABA Guidelines are just what the name implies. They are aspirational and not binding. They do not have the force of law. They are designed to inform, to guide, policymakers and other stakeholders about the substantial harms that result from the now long-running policies by governments to impose fees, cost and bail to help finance the criminal justice system. As we shall see in Section 5 of this article, many States, counties, courts and others involved in the criminal justice system have, in very recent years, taken steps to adopt many of the ABA’s Guidelines. Next, however, we turn to the federal constitution, and what it says about these issues, and also some key United States Supreme Court precedents.

## 4 The Eighth Amendment and Supreme Court Precedent Bearing Upon Excessive Fines

### 4.1 The Eighth Amendment to the Federal Constitution

Under the Eighth Amendment, adopted in 1791 along with the rest of the Bill of Rights, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”<sup>19</sup> Taken together, these clauses “place parallel limitations” on “the power of those entrusted with the criminal-law function of government.” *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal Inc.*, (1989).<sup>20</sup> Haight, in an excellent Law Review article analyzing how so-called Pay-to-Stay schemes can be legally challenged under the Excessive Fines Clause, observes that “United States courts have virtually ignored [this Clause] for the majority of the country’s history” (Haight, 2020: 299).

In three cases, the Supreme Court has attempted to define what constitutes a “fine” under the Clause. In the *Browning-Ferris Industries*<sup>21</sup> case, not decided until 1989, the issue before the Court was whether a jury award of \$6 million in punitive damages was unconstitutionally excessive.<sup>22</sup> At the time the Eighth Amendment was drafted, “fine” meant “a payment to a sovereign as punishment for some offense.”<sup>23</sup> The Court also reasoned the purpose of the Clause was to limit governmental abuses, and so held that punitive fines in civil cases between private parties were outside the scope of the Clause’s protection.<sup>24</sup> Clarifying this point, the Court held, “[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”<sup>25</sup>

Four years later, the Court revisited the Excessive Fines Clause in *Austin v. United States* (1993).<sup>26</sup> After receiving a seven-year prison sentence for cocaine possession, the government filed a forfeiture action in federal court to compel Austin’s forfeiture

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<sup>19</sup> U.S. Const. amend. VIII.

<sup>20</sup> *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989), quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

<sup>21</sup> *Id.*

<sup>22</sup> *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.* 492 U.S. 257, 262 (1989).

<sup>23</sup> *Id.*, at 265.

<sup>24</sup> *Id.*, at 266-67, 275.

<sup>25</sup> *Id.*, at 268.

<sup>26</sup> *Austin v. United States*, 509 U.S. 602 (1993).

of both his business and mobile home. Austin defended on the basis that the forfeiture violated the Excessive Fines Clause.<sup>27</sup> The government argued that the Clause could not apply in civil cases. Affirming that “[t]he Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense,’” the Court held that the relevant question was not whether a fine or forfeiture was imposed in a civil versus a criminal proceeding. Instead, the Court reasoned, the crucial question is whether that fine is intended “at least in part as *punishment*.”<sup>28</sup> The Court also held that even a fine with both remedial and punitive purposes would be sufficient to meet that standard.<sup>29</sup> Under that standard, the *in rem* forfeiture of Austin’s property did constitute a “fine” under the Clause.<sup>30</sup> Accordingly, under the Excessive Fines Clause, a “fine” was indeed “payment to a sovereign as punishment for some offense,” and, as such, an intent to punish was a necessary element of such fines in any proceedings.<sup>31</sup> According to Haight, following those cases it was “clear that a fine must be (1) paid to the sovereign, not to a private party; (2) in cash or in kind; (3) intended at least partially as punishment; and (4) imposed in either a criminal or civil proceeding.”<sup>32</sup>

What those earlier Supreme Court cases did not answer, however, was the question of when is such a fine unconstitutionally excessive. The Court first attempted to do so in *United States v. Bajakajian* (1998).<sup>33</sup> Bajakajian and his family had been traveling through the Los Angeles airport when a United States customs agent discovered \$357,1444 in one of their luggage bags. Bajakajian pled guilty to a federal charge of failing to report the currency.<sup>34</sup> Thereafter, the government sought forfeiture of that entire amount, more than thirty-five times the statutory minimum amount (\$10,000). The Court determined the forfeiture did constitute a fine and that there was punitive intent for the fine.<sup>35</sup> Analyzing the crucial question of whether the fine was excessive, the Court observed that “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is

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<sup>27</sup> *Id.* at 605.

<sup>28</sup> *Id.*, at 610-11 (emphasis added).

<sup>29</sup> *Id.*, at 610.

<sup>30</sup> *Id.*, at 621-22.

<sup>31</sup> *Austin*, 509 U.S. at 622 (quoting *Browning-Ferris Indus. Of Vt. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

<sup>32</sup> Haight (2020) at p. 304.

<sup>33</sup> *United States v. Bajakajian*, 524 U.S. 321 (1998).

<sup>34</sup> 31 U.S.C. §5316 (2012) codifies the reporting requirement.

<sup>35</sup> *United States v. Bajakajian*, 524 U.S. at 328-34 (1998).

designed to punish.” Since the Court could not find any guidance from the history of the Excessive Fines Clause that would inform how to resolve the question of what is excessive, it relied on Eighth Amendment’s Cruel and Unusual Punishment Clause case law. In attempting to derive a constitutional excessiveness standard, the Court first observed that the judiciary has limited discretion to determine whether a fine is disproportionate because judgments about the appropriate punishment for an offense belong in the first instance to the legislature.<sup>36</sup> Secondly, the Court observed that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Therefore, both of these principles, reasoned the Court, counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense. Therefore, the Court decided to adopt the standard of “gross disproportionality” articulated in its Cruel and Unusual Punishment Clause precedents.<sup>37</sup> As Haight states, after *Bajakajian* “[c]ourts cannot strike down financial penalties imposed by the legislature – even disproportionate ones - unless those penalties are not merely disproportionate, but exceptionally so” (Haight, 2020: 305).

The Court held that the government’s forfeiture, under this test, was grossly disproportionate and therefore unconstitutional. The Court did not, however, articulate any clear test for that would constitute a “grossly disproportional” fine. The Court did observe, however, that the statutory maximum penalties for the crime of failure to report were minimal (6 months in jail, \$5,000 fine); and the harm caused to the government was slight.<sup>38</sup> But because the forfeiture was “larger than the \$5,000 fine imposed by the District Court by many orders of magnitude, and it [bore] no articulable correlation to any injury suffered by the Government,” it was unconstitutional.”<sup>39 40</sup>

Another Supreme Court case, *Timbs v. Indiana* (2019),<sup>41</sup> involved the question whether the Eighth Amendment’s Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment’s Due Process

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<sup>36</sup> *United States v. Bajakajian*, 524 U.S. at 336 (1998) (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes.”))

<sup>37</sup> *United States v. Bajakajian*, 524 U.S., 321, 335 (1998).

<sup>38</sup> *United States v. Bajakajian*, 524 U.S. at 338-39.

<sup>39</sup> *United States v. Bajakajian*, 524 U.S. at 339-40.

<sup>40</sup> Congress superseded *Bajakajian* in 31 U.S.C. §5332, which requires a defendant to forfeit all property involved in concealing more than \$10,000 in currency into or outside the United States.

<sup>41</sup> *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

Clause. Tyson Timbs had pleaded guilty in Indiana State court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for \$42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the trial court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed<sup>42</sup>, holding that the Excessive Fines Clause constrains only federal action and was inapplicable to State impositions. The United States Supreme Court granted certiorari.<sup>43</sup> The United States Supreme Court reversed, holding that the Excessive Fines Clause is a "safeguard [that] . . . is 'fundamental to our scheme of ordered liberty'" and that it must apply to the States.<sup>44</sup>

In her article, Haight argues that following *Timbs*, prisoners in State jails and prisons have an increased opportunity to bring legal challenges to pay-and-stay fees, which she argues, are fines and are excessive (Haight, 2020: 306-323). She rightly discusses the grossly harmful nature of these practices, using the example of a man who spent three months in county jail following a misdemeanor conviction where he was charged thirty-five dollars a day for "room and board," saddling him with a \$3,150 bill. The man's only income was a \$600 per month disability payment, and over two years after his release from jail, he still owed the county more than half his bill. Being in default, the county put him back in jail and charged him an additional \$2,275 in daily fees for the new jail time. When finally released, his debt was higher than it had been before he began paying it down. Eventually, the court told the man it would dismiss his bill, but only if he agreed to serve a second 90-day jail stay, which was double the time for his original crime (Haight, 2020: 288).

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<sup>42</sup> *Timbs v. Indiana*, 84 N.E.3d 1179 (2017).

<sup>43</sup> *Timbs v. Indiana*, 585 U.S. (2018).

<sup>44</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (210)).

## 4.2 State Constitutions and Other Rulings on Excessive Fines

Most, if not all States, have provisions in their constitutions that closely track the Eighth Amendment. For example, Article 1, Section 16 of the Michigan State Constitution provides, “Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.”<sup>45</sup>

Federal Appeals Courts have weighed in on the issue of what constitutes an excessive fine. One example is *United States v. Jose*,<sup>46</sup> where the First Circuit enumerated factors to be considered in making this determination. These include whether the statute in question was designed to punish the defendant; the amount of other authorized penalties; and the harm caused by the defendant. The court determined that the forfeiture of the entire \$114,948 defendant used for bulk cash smuggling was not grossly disproportionate to the crime.

When calculating fines, courts must consider the defendant’s financial resources and the burden of the fine to the defendant, as discussed in *United States v. United Mine Workers*.<sup>47</sup> There the court found that a \$3,500,000 fine against a union was excessive, but that a \$700,000 fine was not.

## 5 Is it Possible to Put the Genie Back in the Bottle?

### 5.1 Introduction

We have all heard of the phrase “the genie is out of the bottle,” a metaphor used to describe something that has been released and is now impossible to contain. In many stories about genies, people would find lamps or bottles, pop them open, and a powerful spirit would be set free. Once emerged, the genie would not go willingly back into the bottle – they had to be forced, or more likely, tricked. This was usually the goal of the story, most of which originated centuries ago throughout the Arabic-speaking world, and which became famous worldwide when the Arabian Nights book appeared in Europe in the 1700s. Genies were known to be mischievous, even

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<sup>45</sup> Mich. Constitution (1963) (Article 1, §16).

<sup>46</sup> *United States v. Jose*, 499 F.3 105 (1st Cir. 2007).

<sup>47</sup> *United States v. United Mine Workers*, 330 U.S. 258 (1947).

when they harmed those who freed them from the bottle, and once that spirit is set loose, nobody wants to deal with them.

In performing the research for this article, realizing the scope and gravity of the problem, along with some of the public outcry in at least some corners of the legal community calling for reform, such as the ABA, the Institute for Justice, among many others, the “Genie is out-of-the-bottle” metaphor came to my mind. Once governments<sup>48</sup> (or banks, or airline carriers to name a couple) find easy pathways to generate revenue, especially those that have a name other than taxes, which their constituents do not appreciate, those pathways usually widen, they do not narrow, and they frequently become nearly impossible to close<sup>49</sup>. And of course, the general public is not likely to get too provoked when the government imposes fees, fines, bails and other methods of payment on criminals (whether petty or otherwise). After all, they are the ones who broke the law in the first place. So, the question is this. Given the extent of the forward momentum of the “Fines, Fees and Bail” model that came into vogue several decades ago, can the momentum be stopped? Can the genie be placed back in the bottle? The next sections will try to address this question.

## **5.2 Reflections from the Institute for Justice**

The Institute for Justice represented Tyson Timbs in his Supreme Court case against the State of Indiana. Sam Gedge, a Senior Attorney at the IFJ, wrote a short article in 2024 offering some insights (Gedge, 2024). Gedge wrote that, “The decision was a victory not only for IJ client Tyson Timbs – fighting for forfeiture of his \$40,000 car for a crime involving a few hundred dollars – but for all Americans facing fines and forfeitures disproportionate to their offense. Unanimously, the Court held that the Eighth Amendment’s ban on imposing excessive fines applies to cities and states, and not just the federal government” (Gedge, 2024). Attorney Gedge relates a case in Lantana, Florida on behalf of IFJ’s client Sandy Martinez, a mother of three who works hard to get by. Local code enforcement fined Martinez over \$100,000 because

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<sup>48</sup> Not to mention financial institutions, airlines, internet providers, to pick on just a few that quickly come to my mind. These industries have at least one thing in common: they devise ala carte fees to enhance their revenue streams.

<sup>49</sup> Newton’s First Law of Motion, also known as the Law of Inertia, also comes to mind in this context. Things in motion stay in motion and become difficult to slow down unless acted upon by an unbalanced force. Various activist groups in the American legal system have tried to slow down the runaway “Fines, Fees & Bail” train but the sheer weight of that locomotive means it will take a lot of time and effort to decelerate it.

her car sometimes did not fit perfectly on her small driveway, and two of its wheels rested on grass rather than asphalt. Lantana also fined her nearly \$50,000 after a storm damaged one of her fences. The City fined her another \$16,000 for cracks in her driveway that she could not afford to repair. Martinez is challenging these fines under the excessive fines clause in Florida's state constitution (Gedge, 2024).

Gedge relates another client story out of the Boston, Massachusetts area, this one involving Monica Toth, a grandmother that was fined \$2.17 million by the IRS for failing to file a one-page foreign bank account form. "With governments ever hungry to profit by imposing huge fines, IFJ must also find and close any loopholes that governments try to open in our *Timbs* victory" (Gedge, 2024). "For the first time in its history, the Supreme Court in *Timbs* recognized that the Constitution's '[p]rotection against excessive punitive economic sanctions' is both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" But for a fundamental right to be meaningful, courts must protect it. That is why cases like Sandy's, Allie's, and Monica's are so important: They invite the courts to build on the foundation laid by *Timbs* and construe the Excessive Fines Clause as a real-world check on the government's power to punish" (Gedge, 2024).

As for Tyson Timbs, following the United States Supreme Court ruling in 2019, he had to argue before the Indiana Supreme Court a second time. He had to defend himself at a second forfeiture trial in Marion, Indiana, where he prevailed. He then had to defend that trial court victory before the Indiana Supreme Court once again. His case ended in final victory in June 2021, when the Indiana Supreme Court applied a robust understanding of the Excessive Fines Clause to affirm that Mr. Timbs was entitled to recover his Land Rover.

The lesson from the IFJ is that lawyers around the country must be, as always has been the case, at the vanguard of the fight to ensure constitutional and statutory rights are protected. This means fighting the problems one case at a time. And that is not always terribly efficient. But each victory matters. I would offer the proposal that perhaps states should legislate fee shifting statutes that provide that in cases such as discussed in this paper involving litigation over excessive fines and fees, when the complaining person prevails, they should be able to collect their attorney's fees and costs from the defendant. This paradigm is contrary to the usual American Rule where typically both sides to litigation are responsible for their own counsel



fees, win or lose (Heller, 2018: 45-66). However, fee-shifting statutes can help deter abusive practices, encourage disadvantaged groups to enforce their rights and help foster fundamental change as those bringing suits under such legislation act essentially as assistant attorney generals that can help effectuate positive changes for those persons similarly situated.

### **5.3 United States Department of Justice, Office for Access to Justice, Fines & Fees Report 2023**

In 2023, the Department of Justice, Office for Access to Justice<sup>50</sup>, issued a report highlighting both the significant problems to the justice system and society as a whole associated with excessive fines and fees, and some of the recent gains that have been made (and which are ongoing) in ameliorating these problems (DOJ Report Fines & Fees, 2023). The body of the report consists of 53 pages (with another 16 pages of end notes). Given space limitations here, I will comment on several developments I found particularly interesting. For those readers with the time and inclination, I recommend the entire report (hereinafter: DOJ Report).

In introductory remarks, Associate Attorney General Vanita Gupta writes, “Legal system fines and fees can be devastating to individuals and their families when imposed without regard to circumstances. Individuals who are unable to pay court-imposed assessments often face dramatic penalties that can lead to escalating and inescapable cycles of debt, extended periods of probation and parole, drivers’ license suspension, and repeated, unnecessary incarceration. They can lose their job, driver’s license, home, or even custody of their children” (DOJ Report, Letter from Associate Attorney General Vanita Gupta). These are all themes discussed earlier in this paper. Striking a positive note, even if there is much work that remains undone, Gupta writes, “Many leaders, at all levels of government, have taken considerable and innovative steps to address these unintended consequences. As highlighted in this report, numerous jurisdictions and local leaders from across the country are working alongside advocates, impacted communities and experts to redress the often harmful and counter-productive impacts of fines and fees on the communities they

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<sup>50</sup> The Office for Access to Justice is a standalone agency within the U.S. Department of Justice that plans, develops, and coordinates the implementation of access to justice policy initiatives of high priority to the Department and the executive branch. Its mission is to help ensure all communities have access to the promise and protections of the American legal systems. It attempts to advance this goal by working to ensure justice belongs to everyone, not only those with wealth or status. (DOJ Report, Letter from Director Rachel Rossi, p. 4).

serve. Those efforts deserve amplification and, in many instances, replication . . . Eliminating the unjust imposition of fines and fees is one of the most effective ways for jurisdictions to support the success of youth and low-income individuals, honor constitutional and statutory obligations, and reduce racial disparities in the administration of justice” (DOJ Report, Letter from Associate Attorney General Vanita Gupta).

In her remarks, Access to Justice Director Rachel Rossi adds, “We know the simple reality is that courts and government agencies have come to rely on fines and fees, for both revenue and punishment. We must offer alternatives, resources, and support as jurisdictions explore different approaches. We hope this report can assist to provide such support” (DOJ Report, Letter from Access to Justice Director Rachel Rossi).

Here are some of the steps, according to the DOJ Report, that states, counties, municipalities, courts, and district attorneys’ offices throughout America have taken to decrease the total costs and categories of fees they are assessing against litigants. These “promising practices” have not and will not completely put the genie back in the bottle, but they are a good start and show that with hard work and resolve, even old bad practices can be curbed and reversed.

### **5.3.1 A Sampling of Recent Reform Measures Taken Across America to Reverse the Criminal Justice System’s Long-Standing, Over-Reliance on Fines and Fees to Fund the System**

#### **5.3.1.1 Elimination of All or Many Fines and Fees**

Some jurisdictions have taken steps to eliminate all or many categories of fines and fees that are in their discretion to waive (DOJ Report, 2023: 7-9). California has been very progressive. In 2023, the state legislature passed the “Families Over Fees Act,”<sup>51</sup> that eliminated 23 categories of criminal legal system fees such as those for public defenders and court-appointed counsel, arrest and booking fees, parole and probation supervision fees, home detention fees, certain electronic monitoring fees, fees for work release and work furlough programs, to name a few. The

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<sup>51</sup> AB. 1869, 2019-2020 Reg. Sess. (Cal. 2020). For complete reference see fn. 10 DOJ Report, at p. 58.

comprehensive legislation also forgave all outstanding balances on previously assessed fees in those categories and appropriated to counties \$65 million annually for five years to help make up for lost revenue. I was happy to read that the City of Seattle, Washington, where I practiced law for 30 years, has also been proactive. In 2020, following a study commissioned by the City of Seattle’s Office for Civil Rights, which concluded that Seattle’s criminal system fines and fees disproportionately burden people of color, Seattle Municipal Court judges voted unanimously to eliminate all discretionary fines and fees imposed in criminal cases. These included probation supervision fees, record fees, work crew fees and community service set-up fees.<sup>52</sup>

### **5.3.1.2 Elimination of Juvenile Fines and Fees**

The DOJ report highlights how fines and fees are particularly harmful to the nation’s youth, who most often are not able to pay court-issued fines and fees themselves, thereby burdening parents and guardians. Therefore, there are practical realities that make imposing fines and fees on youth particularly invidious (DOJ Report, 2023: 10-11). “[E]ight states<sup>53</sup> and multiple local governments and juvenile justice agencies have eliminated all juvenile fines and fees, while six states and a number of local governments and juvenile justice agencies have taken the intermediate step of eliminating all juvenile fees. A number of other jurisdictions have abolished certain categories of juvenile fees, such as fees for diversion programs and appointed counsel” (DOJ Report, 2023: 10). I began my career in southeastern Michigan, and practiced law there for several years. Macomb County is the third-most populous county in Michigan and is part of the northern Metropolitan Detroit region. So, I was also happy to read that in 2021, following a year-long study on juvenile court fees, the Macomb County Circuit Court<sup>54</sup> announced it would no longer assess discretionary juvenile court fees, including pay-to-stay fees, fees for court-appointed counsel and fees for probation supervision. The Court also discharged all related debts (DOJ Report, 2023: 11).

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<sup>52</sup> For complete references, see fn. 20, DOJ Report, at p. 59.

<sup>53</sup> Delaware, Illinois, Maryland, Montana, New Jersey, New Mexico, Oregon, and Washington have eliminated all juvenile fines and fees. Arizona, California, Colorado, Louisiana, Nevada, and Texas have eliminated all juvenile fees. For complete references, see fn. 24, DOJ Report, at p. 59.

<sup>54</sup> In Michigan, the state county courts having general jurisdiction (trial courts of first instance) are called Circuit Courts. Other States call these Superior Courts. An oddity is that in New York the Supreme Court is the trial court of unlimited original jurisdiction.

### 5.3.1.3 Elimination of Fees for Requesting and/or Using a Public Defender

I must make a candid admission. Having practiced civil litigation over the course of my 35-year career, there obviously were aspects of criminal law and procedure I was unfamiliar with, even though, as a law student, I clerked in the Oakland County Michigan Circuit Court and watched many criminal trials. Since the Sixth Amendment provides, that indigent persons are entitled to legal counsel in criminal cases where they could not afford to pay their own lawyer, I was unaware that the courts could impose fees when defendant's exercised their Sixth Amendment rights. The DOJ Report enlightened me (DOJ Report, 2023: 12). It states there are two types of assessments commonly imposed on defendants attempting to access a public defender or court-appointed counsel. "The first is flat-rate application or appointment fees that some jurisdictions automatically impose on defendants that request court-appointed counsel. The second are recoupment fees that generally are imposed after disposition to recover the costs for representation. Research has shown that both categories of fees can chill the exercise of the Sixth Amendment right to counsel and undermine trust in the attorney-client relationship" (DOJ Report, 2023: 12). At least seven states: California, Delaware, Hawaii, Nebraska, New York, Pennsylvania, and Rhode Island, together with a number of counties<sup>55</sup>, have abolished or do not authorize fees related to court-appointed counsel for indigent defendants (DOJ Report, 2023: 12).

### 5.3.1.4 Elimination of Fees for Diversion Programs

Diversion programs<sup>56</sup> are an alternative to traditional prosecution and allow participants to avoid criminal convictions, penalties and incarceration while providing rehabilitative or educational services. Unfortunately, some jurisdictions have required persons seeking to avail themselves of diversion programs to pay fees as a precondition or to satisfy other onerous conditions. "Eliminating fees associated

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<sup>55</sup> Every state in America is subdivided into what are known as counties. There are a total of 3,143 counties in America. Michigan, for example, my birth-state, has 83. Detroit is located in Wayne County. Counties were established long ago to basically encourage growth and settlement. Their configuration have not changed much over the years.

<sup>56</sup> For a good article explaining what diversion programs are, and how they benefit defendants and society more generally, see "*Diversion Programs, Explained*," Vera, April 28, 2022. For Access: <https://www.vera.org/diversion-programs-explained>. In short, "Diversion" is a broad term referring to "exit ramps" that move people away from the criminal legal system, offering an alternative to arrest, prosecution, and a life behind bars. According to this article, "[D]iversion programs not only help improve long-term community safety and reduce crime but have also proven to be cost-efficient."

with diversion programs can help ensure that income does not determine access to diversionary programs” (DOJ Report, 2023: 13). The DOR Report provides an example of a case where such fees have been eliminated. In 2020, in Dane County, Wisconsin<sup>57</sup> the Board of Supervisors eliminated fees and associated debt for two diversion programs that provide alternatives to incarceration.

### **5.3.1.5 Elimination of Fees Related to Supervision**

Probation and parole are fundamental aspects of the criminal justice system. Both are forms of supervision following a criminal conviction. Jurisdictions across America have imposed a multitude of fees attached to both forms of supervision, among them: generic “supervision” fees, electronic monitoring fees, fees for drug testing, fees for mandatory programming or counseling, among others. Some policymakers argued these fees are counterproductive and should be eliminated because they imposed “additional debt on individuals at [a] vulnerable juncture [and] can undermine the objectives [of probation and parole] and increase recidivism” (DOJ Report, 2023: 14). Over the past several years several jurisdictions have eliminated fees associated with supervision or with aspects of supervision, such as electronic monitoring. Oregon is one such example. There, in 2021, the Oregon General Assembly passed a bill eliminating the authority to assess probation supervision fees<sup>58</sup> (DOJ Report, 2023: 14).

### **5.3.1.6 Elimination of Carceral Fees<sup>59</sup>**

Carceral fees are assessed against individuals while they are incarcerated and may include room and board (so-called “pay-to-stay” fees), fees for phone calls, emails, medical co-payments, mark-up on commissary<sup>60</sup> items, law library fees, and fees for accessing the money family members deposit into commissary accounts, among many others (DOJ Report, 2023: 16). These fees are particularly cruel because, as discussed elsewhere in this paper, those who are incarcerated are disproportionately poor to begin with, and while locked up earn an average of .52 per hour for any work they do, if they are paid at all. Simply put, these people cannot afford more

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<sup>57</sup> Dade County, Wisconsin is the second-most populous county in Wisconsin, and the home of Madison, location of the University of Wisconsin and the state capital. Over one-half million people reside there.

<sup>58</sup> For complete references, see fn. 49, DOJ Report, at p. 61.

<sup>59</sup> Carceral is an adjective, meaning relating to or of the nature of a prison.

<sup>60</sup> A commissary is like a supermarket or store where the prisoners can buy various food items and other supplies.

debt to be accumulated while incarcerated, especially since they are also likely to have a difficult time finding gainful employment once they are free again. American states and counties have begun to eliminate specific categories of carceral fees. The County Board in Ramsey County, Minnesota<sup>61</sup> eliminated fees for diabetes supplies and over-the-counter medications for people in custody. The Board had already eliminated the County's jail booking fee in 2017<sup>62</sup> (DOJ Report, 2023: 16-17).

### **5.3.1.7 Elimination of Fees for Individuals Who are Acquitted or Whose Case is Dismissed**

Responding to research showing that the failure to waive legal system fees upon dismissal or acquittal significantly erodes the public's trust in the justice system, most jurisdictions waive fees in such circumstances, and at least 10 states with municipal courts either ban or do not authorize courts to impose fees on a defendant who has been acquitted or whose charges have been dismissed (DOJ Report, 2023: 18).

### **5.3.1.8 Other Significant Reforms**

At least six states<sup>63</sup> have passed legislation barring courts and municipalities from assessing new fees, or fees that exceed a certain aggregate threshold, without explicit authorization from the state legislature. An overwhelming majority of states have set caps on how much a defendant can be fined for violation of a local ordinance (DOJ Report, 2023: 19).

Many jurisdictions permit litigants to complete community service in lieu of paying a fine. Community service, however, exacts its own costs such as taking unpaid leave from the person's job, paying for childcare, etc. Some jurisdictions have made reforms to help mitigate these potential unintended consequences, including: ensuring no additional fees are associated with performing that community service; providing expansive definitions of what constitutes community service; allowing courts to tailor community service hours and location to an individual's circumstances; and, credit litigants at a reasonable hourly rate. California and New

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<sup>61</sup> Ramsey County is the second-most populous county in Minnesota. Its county seat and largest city is Saint Paul, also the state capital and the twin city of Minneapolis. St. Paul and Minneapolis are known as the Twin Cities.

<sup>62</sup> For complete references, see fns. 59, 60, DOJ Report, at p. 62.

<sup>63</sup> Those states are: Alabama, Arkansas, Kansas, Missouri, New Jersey, and Wisconsin.

Mexico, for example, ensure community service is proportionate to the underlying offense by crediting litigants for the community service they complete at a fair hourly rate, such as twice the jurisdiction's minimum wage, to pay off the fine or fee amount (DOJ Report, 2023: 20-22).

Some jurisdictions have developed schemes allowing flexible payment options. Reforms that can make payment of fines and fees more equitable and effective include: penalty-free payment plans; opportunities for adjustment following changed circumstances; income-proportionate payment plans; allowing partial payments; enabling multiple methods of payment such as in person or online (DOJ Report, 2023: 30-32).

Over the last five years, 28 states and the District of Columbia have adopted legislation to eliminate or circumscribe the practice of debt-based driver's license restrictions. At least 17 states never place any restrictions on driver's licenses for failure to pay legal system fines and fees. Several additional states also prohibit driver's license restrictions for failure to appear for cases involving petty misdemeanors or fine and fees (DOJ Report, 2023: 36-37).

## **6 Conclusion**

Over the past couple of decades, states and local governments have found myriad ways to increase the fees and fines imposed on criminal defendants to fund their court systems. The Supreme Court in *Timbs*<sup>64</sup> held that the Eighth Amendment's Excessive Fees Clause applies to the State's under the Fourteenth Amendment. Additionally, all American States have prohibitions in their State constitutions that prohibit excessive fines. And as we have seen in *Bajakajian*<sup>65</sup>, the Supreme Court held that grossly disproportionate fees are unconstitutional. Further, in *Bearden*<sup>66</sup> the Court held that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual's ability to pay and making a finding that the failure to pay was willful. Despite this case law, the "excessive fee and fines" defense has not been raised frequently enough with, as we

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<sup>64</sup> *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

<sup>65</sup> *United States v. Bajakajian*, 524 U.S. 321 (1998).

<sup>66</sup> *Bearden v. Georgia*, 461 U.S. 660 (1983).

have seen, horrible consequences for criminal defendants caught up in the criminal justice system.

Recently, much has been written about this issue. This authorship has helped place a spotlight on this serious problem. As this article has highlighted, various groups have made many suggestions about how the criminal justice system can be reformed so as to curb, if not eliminate, the abusive use of fees and fines. As outlined in Section 5, substantial headway has been made. However, reform efforts are still in their early stages, and much work remains to be done. In short, the genie is still outside the bottle.

This article will close by relating key findings and recommendations from a research report conducted by the Brennan Center for Justice in 2019 (Menendez, Eisen 2019). The report, entitled “The Steep Costs of Criminal Justice Fees and Fines,” was the culmination of the examination of 10 counties across Texas, Florida and New Mexico, as well as statewide data for those three states. According to the Report, the counties vary in their geographic, economic, political, and ethnic profiles, as well as in their practices for collecting and enforcing fees and fines. The ultimate conclusion was: “Court fees and fines unjustly burden people with debt just as they are re-entering society. They are also ineffective at raising revenue” (Menendez, Eisen 2019).

## **KEY FINDINGS**

- A. Fees and Fines are Inefficient for Raising Revenue
- B. Collecting Fees and Fines Detracts from Public Safety Efforts
- C. Judges Spend Almost no Time in Court Determining Whether People Can Afford to Pay Fees and Fines
- D. Jailing for Nonpayment is Costly and Irrational
- E. The Amount of Uncollected Debt Continues to Grow
- F. Jurisdictions Do Not Track Costs Related to Collecting Fees and Fines
- G. Fees and Fines are a Regressive Tax on the Poor

## **RECOMMENDATIONS**

- A. States and Localities Should Eliminate Court-Imposed Fees



- B. States Should Require Courts to Assess Fines Based on Ability to Pay
- C. Courts Should Stop the Practice of Jailing and Failure to Pay
- D. States Should Eliminate Driver's License Suspension for Nonpayment of Criminal Fees and Fines
- E. Courts and Agencies Should Improve Data Automation Practices
- F. States Should Pass Laws Requiring Purging of Old Balances That Are Unlikely to Be Paid

It will take much time and effort to reform the American criminal justice system, and to eradicate the injustices caused by the indiscriminate use of fees and fines to fund the system. The words of Martin Luther King come to mind. "Human progress is neither automatic nor inevitable. Every step toward the goals requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals." As we have seen in the last sections of this article, many dedicated individuals across America have indeed begun taking the hard but necessary steps to eradicate the many abusive practices that have occurred in America's criminal justice system over the last several decades.

### **Acknowledgment**

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