



**Written Statement of the American Civil Liberties Union
Before the United States Commission on Civil Rights**

*Hearing On
Municipal Policing and Courts: A Search for Justice or a Quest for Revenue
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On behalf of the American Civil Liberties Union (“ACLU”), we thank the U.S. Commission on Civil Rights for holding this important briefing on “Municipal Policing and Courts: A Search for Justice or a Quest for Revenue.”

For nearly 100 years, the ACLU has worked in courts, legislatures, and communities to defend and preserve the individual rights and liberties guaranteed by the Constitution and the laws of the United States.¹ Consistent with that mission, the ACLU Racial Justice Program brings impact lawsuits designed to have a significant and wide-reaching effect on communities of color in the areas of criminal justice, economic justice, education, affirmative action, and American Indian rights. The ACLU Washington Legislative Office (“WLO”) conducts federal legislative and administrative advocacy to advance the ACLU’s goals.

The ACLU submits this testimony to highlight our concerns about municipal court and policing practices that lead to the phenomenon known as “modern-day debtors’ prisons”—the jailing of people for nonpayment of fines and fees they cannot afford through procedures that violate their most basic constitutional rights. We also provide recommendations on how municipalities can reform these practices, which exact devastating human and financial costs, particularly upon low-income communities of color. These best practices are drawn from reforms adopted by the City of Biloxi, Mississippi to settle a recent ACLU lawsuit, and present a workable model for municipalities seeking to collect fines and fees in compliance with constitutional rights.

Finally, we ask the Commission to issue a written report on municipal revenue-generation practices that lead to the illegal jailing of low-income people, to recommend best practices to address these problems, and to hold an additional briefing on the role of for-profit companies in fostering such practices.

I. Introduction: The Rise of Modern-Day Debtors’ Prisons

Since the Great Recession of 2008-2009, municipalities, counties, and states, hard-pressed to fill budget gaps, have seen a ready source of funds in people accused of misdemeanor criminal offenses, ordinance violations, and civil infractions. Some municipal courts have attempted to supplement their funding and even raise general municipal revenue by charging fees to these people, including fees for public defenders, prosecutors, court administration, jail operation, and probation supervision.

These courts, often with the explicit or implicit support of municipal leaders and police, have used aggressive tactics to collect court-imposed fines, fees, costs, assessments and restitution, which I will refer to collectively as “fines and fees.” Tactics include threatening to jail and incarcerating poor people without affording procedural safeguards, and enlisting for-profit companies that have a financial interest in the debts they seek to collect.

Perversely, although these courts and the municipalities they serve seek to generate revenue, they do not systematically gather and produce data showing that jailing poor people for debts they cannot pay actually makes money when accounting for policing and jailing costs.

¹ The ACLU is a non-partisan organization with more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide.

In 2010, the ACLU documented this nationwide trend in its report, *In for A Penny: The Rise of America's New Debtors' Prisons*. The report presented the results of a year-long investigation into modern-day debtors' prisons in five states.² Since then, the ACLU and its affiliates have continued to expose and challenge debtors' prisons through litigation, documentation, and advocacy in Colorado, Georgia, Louisiana, Maine, Michigan, Mississippi, New Hampshire, Ohio, and Washington.³ In 2015 alone, the ACLU and its affiliates filed lawsuits in federal and state courts in Georgia, Mississippi, Michigan, and Washington.⁴

These investigations reveal that in a wide variety of localities across the country—urban and rural, rich and poor—low-income people are being jailed for failing to pay legal debts they cannot afford at increasingly alarming rates. These debtors' prisons create a two-tiered system of justice that violates basic constitutional rights and is racially-skewed due to the dual impact of racial disparities in the criminal justice system and the racial wealth gap.

II. Debtors' Prisons Violate Constitutional Rights

More than three decades ago, the U.S. Supreme Court clearly established that the promises of equality and fairness embedded in the Fourteenth Amendment to the U.S. Constitution protect against the jailing of poor people simply because of their inability to pay.

² American Civil Liberties Union, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf.

³ ACLU of Louisiana, *LOUISIANA DEBTORS' PRISONS: AN APPEAL TO JUSTICE* (2015), https://www.laaclu.org/resources/LADebtorsPrisons_2015.pdf; ACLU of New Hampshire, *DEBTORS' PRISONS IN NEW HAMPSHIRE* (2015), <http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf>; ACLU of Ohio, *IN JAIL & IN DEBT: OHIO'S PAY-TO-STAY FEES* (2015), <http://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf>; ACLU of Ohio, *THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES* (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf; ACLU of Washington and Columbia Legal Services, *MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR* (2014) [hereinafter *Modern-Day Debtors' Prisons in Washington*], <https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf>; Alison Beyea, *Legislature Has a Chance to End Debtors' Prisons in Maine*, ACLU OF MAINE BLOG (Mar. 8, 2016), <https://aclumaine.org/legislature-has-chance-end-debtors-prisons-maine>; *Debtors' Prisons*, ACLU OF COLORADO, <http://aclu-co.org/court-cases/debtors-prisons/> (last visited Mar. 16, 2016) (compiling 2013 letters to municipalities of Westminster, Northglenn, and Wheat Ridge concerning illegal jailing of people unable to pay fines and fees); Press Release, ACLU of Colorado, *Colorado Legislature Approves Ban on Debtors' Prisons* (Apr. 23, 2014), <http://aclu-co.org/colorado-legislature-approves-ban-debtors-prisons/>.

⁴ Complaint, *Thompson v. Dekalb County*, No. 1:15-cv-280-TWT (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/field_document/2015.01.29Filed_thompson_complaint.pdf; Complaint, *Fuentes v. Benton County, Washington*, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County Oct. 6, 2015), https://www.aclu.org/sites/default/files/field_document/fuentes_v._benton_county_-_complaint.pdf; Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), <https://www.aclu.org/kennedy-v-city-biloxi-complaint>; Complaint for Superintending Control, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Cir. Court County of Macomb Jul. 9, 2015), <http://www.aclumich.org/sites/default/files/Complaint%20for%20Superintending%20Control%20with%20exhibits%20FILED.pdf>.

A. Right to an Ability to Pay Hearing

In 1970, the Supreme Court held in *Williams v. Illinois* that the Fourteenth Amendment's Equal Protection Clause prohibited a court from extending a maximum prison term because the defendant failed to pay court costs or fines he could not afford.⁵ The following year, the Supreme Court held in *Tate v. Short* that the Equal Protection Clause also prohibited the jailing of an indigent defendant solely because he could not afford to pay a fine imposed under a fine-only statute.⁶

In 1983, the Supreme Court issued *Bearden v. Georgia*, its landmark decision on the procedural protections applicable to court collection of fines and restitution. It ruled that the Fourteenth Amendment's Equal Protection and Due Process Clauses require judges to conduct a meaningful "inquir[y] into the reasons for failure to pay" before jailing a person for nonpayment.⁷ Judges must examine the person's ability to pay and efforts to secure resources.⁸ And if the court determines that the person is unable to pay, despite having made good faith efforts to acquire money, it must consider alternative punishments to incarceration before imposing jail for nonpayment, with a recognition that the state's interest "in punishment and deterrence . . . can often be served fully by alternative means."⁹ Alternatives include an extension of time to make payments, a reduction or waiver of the amount owed, and community service.¹⁰ *Bearden* made clear that judges can only impose jail if a debtor is found to have "willfully" failed to pay or to make bona fide efforts to do so, or if there is good reason to conclude that no alternative measures would accomplish punishment and deterrence.¹¹

B. Right to Counsel

The right to counsel also applies to key points in the process when municipal courts impose and collect fines and fees. The Sixth Amendment requires the provision of counsel to a defendant in any criminal proceeding that results in a jail sentence.¹² It also requires that people sentenced to probation be afforded counsel at the conviction and sentencing stages.¹³

The Fourteenth Amendment Due Process Clause additionally affords all indigent people the right to court-appointed counsel at no cost when they face possible incarceration for failure to pay a fine or fee, and affords all people a right to at least request representation by legal counsel in that

⁵ *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

⁶ *Tate v. Short*, 401 U.S. 395, 397–98 (1971).

⁷ *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

⁸ *Id.*

⁹ *Id.* at 671–72 (emphasis supplied). The Supreme Court noted that the requirement that a court consider alternative forms of punishment was not "novel," since earlier decisions in *Williams*, 399 U.S. 235, and *Tate*, 401 U.S. 395, had also "emphasized the availability of alternative forms of punishment in holding that indigents could not be subjected automatically to imprisonment." *Bearden*, 461 U.S. at 673 n.12 (internal quotations omitted).

¹⁰ *Bearden*, 461 U.S. at 671–72.

¹¹ *Id.* at 672.

¹² *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37–38 (1972).

¹³ *Alabama v. Shelton*, 535 U.S. 654, 662 (2002).

situation. These rights apply whether a person is charged with civil contempt¹⁴ or probation violation¹⁵ for nonpayment.

Courts must inform people of these rights concerning counsel when seeking to impose jail or probation to collect fines and fees.¹⁶ They may not accept a written or oral waiver of a right to counsel without first informing the person of the risks and dangers of proceeding without counsel and the benefits of proceeding with counsel, and without ensuring that any waiver is knowing, intelligent, and voluntary.¹⁷

Appointment of counsel to the indigent is critically important to preventing and addressing debtors' prisons. Proceeding without counsel increases the risk that a person will be wrongfully jailed for nonpayment. The assistance of counsel can help a poor person assert her rights, prepare and present financial hardship documentation to the court, argue in favor of alternatives to incarceration, and advocate against jail as punishment for nonpayment.

C. Right to Neutral Decisionmakers in the Justice System

Finally, the Supreme Court long ago established that due process protects people from justice system decisionmakers who have a direct or indirect financial interest in the outcome of their proceedings in its decisions in *Tumey v. Ohio* and *Ward v. Village of Monroeville, Ohio*.¹⁸ These concerns about fairness and due process apply when for-profit probation companies, courts, prosecutors, or public defenders gain profit or depend on revenue from the fees they collect.

¹⁴ See, e.g., *Turner v. Rogers*, 131 S.Ct. 2507, 2519–20 (2011) (denying categorical due process right to counsel for indigent non-custodial parents charged with nonpayment of child support in hearings brought by unrepresented custodial parents, but distinguishing “debt-collection proceedings” where financial obligations are owed to the state).

¹⁵ The Supreme Court’s decisions in *Bearden* and *Gagnon v. Scarpelli* together establish that due process affords a right to counsel in probation revocation proceedings concerning failure-to-pay charges. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (“[C]ounsel should be provided” when probationer is informed of right to request counsel and does so “based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that . . . there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.”); *Bearden v. Georgia*, 461 U.S. at 668–69 (“[I]f [a] probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own,” that “lack of fault” for non-payment “provides a substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate.”) (citing *Gagnon*, 411 U.S. at 790).

¹⁶ See *Gagnon*, 411 U.S. at 790 (recognizing obligation of the court to inform probationers of right to request counsel in revocation proceedings).

¹⁷ See *United States v. Hodges*, 460 F.3d 646, 648 (5th Cir. 2006) (requiring waiver of probationer’s right to counsel to “be knowing and voluntary as demonstrated either through a colloquy with the district court or by the totality of the circumstances, or both”); *United States v. Gewin*, 759 F.3d 72, 88–89 (D.C. Cir. 2014) (Pillard, J., concurring), *cert denied*, 135 S. Ct. 1866 (2015) (reasoning that due process right to counsel applied to civil contempt proceeding concerning nonpayment of fines and restitution and that “best practice” required a “prompt and explicit colloquy on the record” to determine whether waiver of the right was knowing and intelligent); *In re Winslow*, 131 B.R. 171, 174 (D. Colo.), *decision clarified*, 132 B.R. 1020 (D. Colo. 1991) (requiring lower court to determine whether debtors had knowingly and intelligently waived right to counsel in civil contempt proceedings).

¹⁸ See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (invalidating conviction because mayor who adjudicated the proceeding received a \$12 fee only upon the defendant’s conviction); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61–62 (1972) (extending the reasoning of *Tumey* to cases in which the judge has an institutional, if not personal, financial interest in the outcome).

III. Municipal Revenue Generation Practices Fuel Debtors' Prisons Across the Country

Many of the debtors' prisons practices challenged by the ACLU concern schemes to raise revenue for municipal courts or city coffers. They involve courts, police, or probation companies that use threats of jail and incarceration to elicit payments toward unpaid fines and fees, including from the poor. In their quest for revenue, these local governments and courts either intend to flout constitutional safeguards against the jailing of the poor, are woefully ignorant of those protections, or are unsure how to apply them.

The ACLU has documented these practices in a wide variety of municipalities that span the country, from the Pacific Northwest to New England, and from the Midwest to the Deep South. No region of the United States has a monopoly on these unsound practices. ACLU investigations in Ohio, Washington, and Georgia provide illustrative examples.

A. Ohio Mayor's Courts

In *In for a Penny*, the ACLU exposed how one Ohio town with a population of 60 collected more than \$400,000 in one year in fines and fees assessed in its "mayor's court."¹⁹ Mayor's courts are largely unregulated courts in Ohio that handle minor misdemeanor cases.²⁰ They are infamous for assessing inordinate fines and fees to generate revenue for local budgets, as shown by the dramatic disparity between their population figures and the fine and fee amounts they collect annually for low-level offenses.

B. Benton County, Washington

In 2015, the ACLU filed a class-action lawsuit against Benton County in central Washington state over its unconstitutional system for collecting court-imposed debts. That system sought to fund County services by extracting revenue and labor from low-income people.²¹ Prior to the lawsuit, Benton County routinely assessed fines, fees, costs, and assessments in an amount upwards of \$1,000 for each offense without considering a person's ability to pay.²² When indigent people fell behind on payments, Benton County sought to extract money by sentencing them to jail or to provide labor for the County on a work crew without any prior inquiry into whether nonpayment was willful.²³ For many people, including the plaintiffs in our case, a work crew sentence quickly transitioned to incarceration for minor infractions, again, without any prior determination of ability to pay.²⁴

¹⁹ *IN FOR A PENNY*, *supra* note 2 at 8.

²⁰ Ohio law currently allows mayors of municipal corporations populated by more than 200 people where there is no municipal court to conduct "mayor's court" for violations of local ordinances and state traffic laws. Mayor's courts are not courts of record and are not technically part of the state judiciary. At the request of the General Assembly, the Supreme Court has adopted rules providing for court procedures and basic legal education for mayors, but there are no enforcement proceedings. A mayor is not required to be a lawyer. A person convicted in a mayor's court may appeal the conviction to the municipal or county court having jurisdiction within the municipal corporation. *See* Ohio Rev. Code § 1905.01(A).

²¹ Complaint, *Fuentes v. Benton County, Washington*, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County Oct. 6, 2015), https://www.aclu.org/sites/default/files/field_document/fuentes_v._benton_county_-_complaint.pdf.

²² *Id.* ¶ 2.

²³ *Id.* ¶ 2.

²⁴ *Id.* ¶ 9.

The ACLU of Washington had exposed this illegal revenue generation scheme in a 2014 report on debtors' prisons, and sent a letter to Benton County demanding reforms.²⁵ Despite being on notice of their violation of the law, County policymakers retained their program of extracting money and free labor from low-income people through jail and work crew, which prompted the ACLU's lawsuit.²⁶

C. DeKalb County, Georgia

The ACLU's federal lawsuit against DeKalb County, Georgia shined a bright light on a municipal scheme to use for-profit probation to generate revenue that resulted in a racially-skewed debtors' prison.

In 2015, we filed suit on behalf of Kevin Thompson, a Black teenager in DeKalb County who was jailed because he could not afford to pay court fines and probation company fees stemming from a traffic ticket.²⁷ Thompson was not alone. While Blacks made up 54% of the DeKalb County population at that time, nearly all probationers jailed by the DeKalb County Recorders Court for nonpayment of fines and fees in the months leading up to the *Thompson* suit were Black—a pattern replicated by other Georgia courts.²⁸

The lawsuit charged that DeKalb County and the for-profit probation company, Judicial Correction Services, Inc. (JCS), teamed up to generate county revenue and JCS fees by collecting fines and fees imposed by the County's Recorders Court, including from people too poor to pay on sentencing day.

In this scheme, the Recorders Court served as a significant source of general County revenue.²⁹ In 2010, DeKalb County faced a \$100 million revenue shortfall and relied on the Recorders Court fine and fee collections to help bridge the gap.³⁰ According to public records, the amount of revenue raised by the Recorders Court skyrocketed to over \$30 million in 2013 from \$21 million in 2009.³¹ In 2014, the Recorders Court was projected to generate almost \$27 million in

²⁵ See Modern-Day Debtors' Prisons in Washington; Letter from American Civil Liberties Union of Washington and Columbia Legal Services to Benton County Superior Court, Benton County District Court (Feb. 4, 2014), <https://aclu-wa.org/sites/default/files/attachments/2014-02-07%20Benton%20County%20Letter.pdf>.

²⁶ Complaint ¶ 6, *Fuentes*, *supra* note 21.

²⁷ Complaint, *Thompson v. Dekalb County*, No. 1:15-cv-280-TWT (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/field_document/2015.01.29_filed_thompson_complaint.pdf.

²⁸ U.S. Census Bureau, *2014 American Community Survey*, 5-year Estimate, Table DP05 DeKalb County, Georgia, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/14_5YR/DP05/0500000US13089; Notes on file with Nusrat J. Choudhury from May 23, 2014; June 6, 2014; June 13, 2014; July 11, 2014; August 1, 2014; August 8, 2014; October 6, 2014; October 27, 2014 DeKalb County Recorder's Court Probation Revocation Hearings; Notes on file with Nusrat J. Choudhury from December 2014 and January 2015 Interviews in the DeKalb County Jail.

²⁹ Complaint ¶ 64, *Thompson*, *supra* note 27.

³⁰ *Id.* ¶ 64.

³¹ DeKalb County, Georgia, ANNUAL BUDGET 2014 279–280 (2014), http://dekalbcountyga.gov/finance/pdf/2014_budget_book.pdf; DeKalb County, Georgia, ANNUAL BUDGET 2009 268 (2009), http://dekalbcountyga.gov/finance/pdf/budget/2009/DeKalb_2009_Budget_Book.pdf.

revenue for DeKalb County, even though its projected operating cost was less than \$3.8 million.³²

In the year before the *Thompson* suit was filed, the Recorders Court collected seven times more revenue than its cost of operation by soliciting and implementing a probation program run by JCS, a for-profit company that promised to boost collections.³³ But neither DeKalb County nor JCS addressed how their employees, including judges and probation officers, would inform probationers charged with nonpayment of their right to request counsel and to a predeprivation ability-to-pay hearing, the guidelines that would be used to identify those who could not pay, or what alternatives to incarceration were available for the indigent.³⁴ JCS faced a direct financial incentive not to identify the indigent and not to inform them of their rights because JCS service fees for the indigent should have been reduced, waived, or convert to community service.³⁵

Kevin Thompson was jailed as a direct result of this revenue generation scheme. When he told his JCS probation officer that he had only been able to secure \$85 by working odd jobs and borrowing money from his family, the JCS employee did not inform him of his rights or notify him that the court could waive or reduce his fines and fees upon a demonstration of indigence. The Recorders Court revoked Thompson's probation and sentenced him to jail in a hearing that lasted only minutes. Mr. Thompson was handcuffed in front of his mother and incarcerated for five days.

DeKalb County paid the costs of incarcerating Kevin Thompson, but did not collect a penny of the more than \$800 in fines and fees that this unemployed teenager could not afford to pay.

The *Thompson* case ultimately helped to dismantle DeKalb County's system of generating revenue through for-profit probation. It resulted in a settlement involving policy reforms, including training and the adoption of a bench card to guide judges on how to protect the right to counsel and avoid sending indigent people to jail for unpaid fines and fees. The Georgia General Assembly subsequently dissolved the DeKalb County Recorders Court, sending its traffic docket to a division of the state court, where for-profit probation is not used to collect fines and fees.³⁶

³² DeKalb County, Georgia, ANNUAL BUDGET 2014 279-280 (2014), http://dekalbcountyga.gov/finance/pdf/2014_budget_book.pdf.

³³ DeKalb County Dept. of Purchasing and Contracting, Request for Proposals for Comprehensive Professional Probation Services for the Recorder's Court in DeKalb County, Ga., No. 08-50079 (March 20, 2008) (Records obtained through public records request and are on file with the author); Agreement to Provide Comprehensive Professional Probation Services for the Recorders Court of DeKalb County, Georgia with Judicial Correction Services, LLC (hereinafter, "2008 DeKalb-JCS Contract") (Sept. 9, 2008) (Records obtained through public records request and are on file with the author); Professional Probation Services Agreement, Contract by and between Chief Judge Nelly Withers and Judicial Correction Services, LLC (Dec. 8, 2011) (hereinafter "2011 DCRC-JCS Contract"), Bates No. DCRC000029-50, 28- 29 (document on file with Nusrat Choudhury) Contract was produced on Aug.28, 2014 in response to an Aug. 19, 2014 Open Records Request to the DeKalb County Recorder's Court filed by the ACLU.

³⁴ Judicial Corrections Services, Inc., Service Provider Response to DeKalb County Request for Proposals 08-500079, Appendix II to 2008 DeKalb-JCS Contract at 3, 7, 9-11; 2008 DeKalb-JCS Contract; 2011 DCRC-JCS Contract; Complaint ¶¶ 95-96, *Thompson* ¶ 3, *supra* note 27.

³⁵ *Id.* ¶ 75.

³⁶ In 2015, the Georgia General Assembly passed House Bill 300, which established a traffic division for the State Court of DeKalb County to handle traffic cases for DeKalb County. H.B. 300, 153rd Gen. Assemb., Reg. Sess. (Ga.

The Atlanta Journal Constitution recently reported that the average amount of traffic fines has dramatically decreased since the ACLU sued.³⁷ Since the settlement, we have not observed or been notified of people being jailed for unpaid traffic tickets without access to counsel or a court hearing on their ability to pay.

These examples from Georgia, Washington, and Ohio show that municipalities that mistakenly view fines and fees as much-needed revenue engage in distorted collections practices that result in jailing of the poor in violation of their rights to due process and equal protection under the law.

IV. Five Paths to Debtors' Prisons

Challenging debtors' prisons requires understanding how they come about. The ACLU has identified five mechanisms by which municipal courts and police wrongfully jail people for nonpayment of fines and fees they cannot afford.

A. "Pay-or-Stay" Sentences

The first path to debtors' prisons involves the issuance of so-called "pay-or-stay" sentences. These sentences offer poor people the false "choice" of immediately paying a certain amount of money in fines and fees or going to jail.

In 2011, the ACLU and ACLU of Michigan represented seven indigent people in appealing their pay-or-stay sentences in state court.³⁸ One of them, Kyle Dewitt, was an unemployed teenager, charged with catching a fish out of season, and was sentenced to \$215 in fines or three days in jail. The judge did not hold a hearing to determine whether he could afford to pay the fines. Nor did the judge consider setting up a payment plan or requiring community service instead. Dewitt was jailed because he did not have the money to pay.

The ACLU ultimately secured the release of all seven of our clients. Yet, illegal pay-or-stay sentences persist.

Last July, the ACLU of Michigan filed a motion requesting that the Macomb County Circuit Court in Michigan take superintending control over Michigan's 38th District Court in Eastpointe, where the presiding judge had an established practice of imposing illegal pay-or-stay sentences on indigent people.³⁹ That motion was granted last week. The presiding judge is now prohibited

2015) It also passed HB 302, which abolished the DeKalb County Recorders Court effective on July 1, 2015. H.B. 302, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

³⁷ Mark Niese, *DeKalb Traffic Fines Decline after Court Abolished*, ATLANTA J, CONST, Jan. 15, 2016, <http://www.myajc.com/news/news/local-govt-politics/dekalb-traffic-fines-decline-after-court-abolished/np5SL/> (reporting that the average amount collected from each traffic ticket plunged from a high of \$159 in 2013 to about \$100 or less in 2015).

³⁸ ACLU of Michigan, PAY OR STAY CLIENTS , <http://www.aclumich.org/pay-or-stay-clients> (last visited Mar. 13, 2016).

³⁹ Complaint for Superintending Control ¶ 2, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Cir. Court Mich. County of Macomb, Jul. 9, 2015), <http://www.aclumich.org/sites/default/files/ComplaintforSuperintendingControlWithoutExhibits.pdf>.

from jailing people for nonpayment of fines and fees without first making an on-the-record finding that the payment will not impose manifest hardship and that the defendant has not made a good faith effort to comply with the order.⁴⁰

B. Immediate Courthouse Detention After Sentencing

A second path to debtors' prisons results from the illegal detention of people in the courthouse immediately after sentencing in order to coerce payment toward fines and fees.

In May 2014, a 32-year-old mother of two appeared in court in a Mississippi municipality to contest a traffic ticket received while taking her kids to school. The judge found her guilty of having a defaced vehicle registration tag and sentenced her to pay to \$236 in a fine and a local assessment, even though the maximum penalty under Mississippi law was just \$25. The woman did not have a lawyer to dispute the fine. When she informed the judge that she could not afford to pay, a police officer told her she would not be able to leave the municipal building until she paid a significant amount toward her fine and fee.

Terrified of being separated from her children, this woman frantically called family and friends. Police detained her for hours until a friend arrived with \$50 in cash to prevent her from being jailed overnight. Several others were similarly detained after informing the judge that they could not afford to pay fines and fees that day, including a woman who was eight months pregnant at the time.

C. For-Profit Probation for Debt Collection

A third path to debtors' prison involves the use of "pay-only" probation—probation imposed for the sole purpose of collecting fines and fees from people who cannot afford to pay on sentencing day. When probationers fall behind on payments, courts revoke probation and impose jail time without providing notice, access to counsel, or proper hearings.

The rise of the for-profit probation industry has fueled the probation path to debtors' prison.⁴¹ For-profit probation companies currently operate in at least twelve states.⁴² They employ a so-called "offender-funded" model that contributes directly to the illegal jailing of poor people for unpaid fines and fees.

⁴⁰ Stipulation and Order of Superintending Control at 2, ¶ 1, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Order dated Mar. 8, 2016), http://www.aclumich.org/sites/default/files/Order%20for%20Superintending%20Control_0.pdf.

⁴¹ See Christine Schloss and Lianne Alaird, *Standards in the Privatization of Probation Services: A Statutory Analysis*, 32 CRIM. JUS. REV. 233 (2007), <http://www.sagepub.com/hanserstudy/articles/05/Schloss.pdf> ("[S]tate budgets have not been able to keep pace with the burgeoning probation populations and clients currently on community supervision.").

⁴² Human Rights Watch, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 12 n.3 (2014), http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf (noting operation of private probation companies in Alabama, Colorado, Florida, Georgia, Idaho, Michigan, Mississippi, Missouri, Montana, Tennessee, Utah, and Washington).

For-profit probation companies offer local governments the service of collecting legal debts from people sentenced for misdemeanor and traffic offenses and ordinance violations. But instead of billing public authorities, the companies charge probationers monthly “supervision fees,” which are often a company’s sole source of revenue.

As a result, for-profit company probation officers face a conflict of interest. As probation officers, they should collect fines from those who can pay and help the court identify those who cannot pay and who face limitations on their ability to find work and earn money. Instead, these company employees face significant pressure not to hurt the company bottom line by identifying the indigent or informing them of their rights.⁴³

In 2014, Human Rights Watch documented private probation officers’ relentless focus on payment in Georgia and Mississippi.⁴⁴ It exposed officers who threatened to have probationers jailed for falling behind on payments and who sought arrest warrants to coerce probationers and their families into paying some of what was owed in exchange for probationers’ freedom.⁴⁵

The probation path to debtors’ prison is vividly illustrated by the ACLU’s lawsuit, *Thompson v. DeKalb County*. When Kevin Thompson told his JCS probation officer that he could not meet the court’s requirement of paying more than \$800 in thirty days because he was unemployed and could not secure work due to a suspended driver’s license, the probation officer did not tell him that the court could waive or reduce his fines and fees upon a demonstration of indigence. Instead, the JCS probation officer misinformed Thompson that he would have to pay an additional \$150 for a public defender to represent him in his probation revocation proceedings when the cost was actually \$50 and waivable for the indigent. After providing this incorrect and incomplete information, the JCS probation officer checked a box off on a form signed by Mr. Thompson to indicate that he had purportedly waived his right to a public defender.

Without an advocate to help him prove his inability to pay and painstaking efforts to work odd jobs and borrow money, Kevin Thompson was jailed.

D. Failure-to-Pay Warrants and Jailhouse Shakedowns for Cash

The fourth path to debtor’s prisons involves the arrest and jailing of poor people on failure-to-pay warrants, often called civil contempt, “capias,” or “capias pro finem” warrants. In these cases, after a court is notified that a person has fallen behind on fine and fee payments, it issues a warrant directing law enforcement officers to arrest and jail the person, unless she can

⁴³ Not only do private probation officers suffer from a conflict of interest in dealing with poor probationers, they also prioritize private company profit margins over the needs of courts. The Georgia Department of Audits and Accounts Performance Division conducted an audit of for-profit probation companies in 2014. It found that three of the 13 companies audited consistently prioritized the collection of supervision fees over court fines, state surcharges, restitution, and other accounts. It also found that these companies sought to ensure that all supervision fees were paid before allocating funds to other recipients and altered the allocation method late in a probation term to ensure the payment of supervision fees in full. Misdemeanor Probation Operations, Georgia Department of Audits and Accounts Performance Audit Division, Report No. 12-06 at 34 (Apr. 2014), <http://chronicle.augusta.com/images/2014/auditMisdemeanorProbation.pdf>.

⁴⁴ See PROFITING FROM PROBATION, *supra* note 42 at 10.

⁴⁵ *Id.* at 26, 46.

immediately pay in cash the entire amount of the fines and fees owed. Police officers execute failure-to-pay warrants at traffic and pedestrian stops, and in response to calls for police assistance. Debtors are booked and jailed for days unless they can quickly come up with the money.

In one municipality investigated by the ACLU, public records showed that during a nine-month period in 2014 and 2015, more than 2,681 failure-to-pay warrants were issued against at least 1,520 different people, directing law enforcement to arrest them for nonpayment of fines and fees.⁴⁶ Public records also showed that during a seven-month period in 2014 and 2015, 415 different people were booked in jail pursuant to these warrants issued and were unable to pay any money to secure their release.⁴⁷ The city had no practice of enduring that people were informed of their right to request counsel or afforded an ability-to-pay hearing before being arrested and subjected to what was literally a jailhouse shakedown for cash.

In several Mississippi municipalities, failure-to-pay warrants are widely issued even against probationers who should be afforded standard probation revocation procedures. Those procedures require notice of the charge of nonpayment and a hearing at which the court informs the probationer of her right to request counsel, appoints counsel if the probationer is indigent, and conducts an ability-to-pay hearing.

E. Improper Revocation of Work Release

A fifth path to the illegal jailing of the poor results from the use of work release as a back door to debtors' prison.

The ACLU is challenging such a system in our lawsuit against Benton County, Washington. Prior to the lawsuit, Benton County routinely assessed fines and fees in an amount upwards of \$1,000 for each offense without considering a person's ability to pay. Indigent people who were unable to pay were sentenced to a work crew, where they performed free janitorial or landscaping services for the County. Work crew sentences often quickly transitioned to jail sentences without adequate notice or opportunity to be heard based on minor infractions.

For example, if a person was unable to appear at work crew due to a lack of transportation, Benton County automatically converted work crew placement into a jail sentence without providing an intervening court hearing on the underlying issue—the person's inability to pay fines and fees.

V. Municipal Revenue Generation Schemes that Target the Poor Have a Devastating Impact on Communities and Undermine Public Safety

No matter how they come about, municipal revenue generation practices that target the poor and lead to debtors' prisons impose devastating human costs. They expose people to job loss,

⁴⁶ Declaration of Nina Papachristou in Support of Plaintiffs' Motion for Class Certification ¶ 19–20, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), <https://www.aclu.org/kennedy-v-city-biloxi-papachristou-declaration-support-plaintiffs-motion-class-certification>.

⁴⁷ *Id.* ¶ 14.

separation from their families, and repeated, unnecessary incarceration despite posing no danger to the community. They also force poor people and their families to forgo basic necessities and to use money from means-tested public assistance programs to avoid arrest and jail. The resulting cycle of poverty and jail can be nearly impossible to escape.

When police are involved in these practices, entire communities feel alienated. This, in turn, undermines public safety.

ACLU investigation into one Mississippi municipality revealed in poignant detail the extent of this alienation. This municipality widely used arrest warrants to jail people who could not pay fines and fees in cash and in full upon arrest. Because of the racial wealth gap, low-income Black people were particularly impacted. Many Black people reported feeling chilled from seeking police assistance, even when faced with threats to their safety, because contacting police would expose them to debtors' prison.

We interviewed a mother of five who had fallen behind on paying traffic fines while unemployed and who feared that outstanding *capias* warrants called for her arrest. This woman is a domestic violence survivor, and one day last year, her husband became violent during an argument. Although she was in a desperate situation, the woman delayed calling police for help because she feared arrest for unpaid fines and fees. In the end, scared for herself and her children, she called the police.

By the time officers arrived on the scene, her husband had fled. But, the woman's worst fears were confirmed when police officers ran her name for warrants and arrested her for unpaid fines. At jail, the officers demanded that she pay the entire amount she owed—more than \$1,000. Unable to pay, she was jailed for four days and separated from her children.

This domestic violence survivor felt betrayed by the police who arrested her for unpaid fines rather than pursuing her abuser. Her feeling of alienation toward the police is a sentiment shared by many Black people in her Mississippi town.

When municipalities place their police officers and courts in the role of revenue generators, they undermine public safety and the fair and equal administration of justice. And police fail to serve those whom they were sworn to protect.

VI. Returning Municipal Courts and Police to their Rightful Role: The Biloxi Model

Despite the Supreme Court's clear ban on debtors' prisons more than three decades ago, they have reemerged in recent years for five principal reasons.

First, in some municipalities, judges, court staff, probation officers, police, public defenders, and municipal leaders willfully ignore clearly established law that protects the rights of the poor in the face of pressure to raise revenue.

Second, in other municipalities, the lack of standards and guidelines for judges on when to afford counsel, how to conduct ability-to-pay hearings, and what alternatives to incarceration to

consider contributes to the improper use of threats of jail and incarceration to elicit payment toward fines and fees.

Third, due to the profit motive, probation officers employed by for-profit companies, at best, will fail to assist and, at worst, will actively undermine, courts' ability to identify indigent people whose fines and fees should be reduced or waived.

Fourth, the imposition of additional fees, costs, and assessments that seek to recoup the cost of the justice system or raise revenue for public services leads to large debt burdens that poor people can never pay.

And fifth, states that suspend or revoke driver's licenses for nonpayment of fines and fees without ensuring that only those who have willfully failed to pay are sanctioned criminalize the poor, leading to more tickets, more fines and fees, and greater risk of jail.

These problems appear daunting. But we have readily available solutions to address each one of them. The response of the City of Biloxi ("Biloxi"), Mississippi to an ACLU lawsuit illustrates exactly what municipalities can do to chart a different path.

In October 2015, the ACLU brought a class action lawsuit in federal court against Biloxi and JCS to challenge the widespread arrest and jailing of poor people pursuant to failure-to-pay warrants without prior procedural protections. This past Tuesday, the lawsuit was settled with Biloxi's adoption of sweeping reforms that provide a powerful model for protecting the rights of the poor while punishing and deterring offenses.⁴⁸

The Biloxi reforms include dozens of best practices. There are ten components that explicitly push back against the use of courts and the police to generate municipal revenue.

1. **Elimination of For-Profit Probation.** Under Biloxi's new court procedures, for-profit probation companies will no longer be used to collect fines and fees by June 1, 2016. By eliminating the profit incentive from its collections process, Biloxi has sent a powerful message that for-profit companies do not help judges protect constitutional rights when collecting fines and fees or deterring and punishing crime.⁴⁹
2. **Adoption of Detailed Court Procedures and a "Bench Card."** Biloxi has adopted detailed court procedures and a "bench card" to guide judges on how to avoid sending people to jail because they are unable to pay court fines and fees. The procedures address how to protect constitutional rights to counsel and to procedural due process at every stage at which fines and fees are imposed or collected, including initial appearance,

⁴⁸ See Stipulated Settlement Agreement, Exhibit A, Exhibit B, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Mar. 15, 2016) [hereinafter Stipulated Settlement Agreement], https://www.aclu.org/sites/default/files/field_document/final_stipulated_settlement_agreement_exhibit_a_exhibit_b_03152016_0.pdf.

⁴⁹ See *id.* ¶ 2.

sentencing, and enforcement.⁵⁰ Judges, court staff, police, prosecutors, and public defenders will be trained on these new procedures.⁵¹

3. **Judges' Consideration of Ability to Pay at Sentencing.** Judges will consider a defendant's ability to pay at sentencing when setting the amount of fines and fees to prevent the imposition of crippling fine and fee burdens that poor defendants cannot hope to repay.⁵² Judges are encouraged to reduce or waive the amount of fines and fees based on ability to pay, and to consider alternatives to fines and fees, including community service and participation in approved job skills training, education, mental health, drug treatment, and other counseling programs.⁵³
4. **Establishment of a Full-Time Public Defender's Office.** Biloxi has established a public defender's office to ensure that every indigent person is provided the benefit of counsel at no cost whenever it is required. This includes sentencing proceedings that involve the imposition of jail or probation for fine or fee collection or in which the judge wishes to preserve her ability to impose jail or probation in the future. It also includes any hearing at which an indigent person faces possible incarceration for nonpayment of fines and fees.⁵⁴ A lawyer is able to raise the issue of ability to pay and present compelling evidence of a defendant's financial situation, efforts to abide by their court obligations, and the availability of alternative punishments, such as a waiver, reduction in the amount of fines and fees owed, or community service.
5. **Termination of Failure-to-Pay Warrants and Establishment of Compliance Hearings.** Biloxi has eliminated the use of failure-to-pay warrants, including *capias* and *capias pro finem* warrants ordering the immediate arrest and jailing of people for unpaid fines and fees.⁵⁵ Instead, it will send advisement of rights forms to people charged with nonpayment and hold Compliance Hearings in which judges will inform people of their right to request court-appointed counsel, appoint counsel for indigent people facing possible incarceration, conduct ability-to-pay hearings, and consider alternatives to incarceration for those unable to pay.⁵⁶
6. **Alternatives to Incarceration Without Additional Participation Fees.** Biloxi Municipal Court judges will not impose additional fees or interest on anyone sentenced to a payment plan or to the performance of community service or an approved job skills training, mental health counseling, or drug treatment program as an alternative to incarceration for nonpayment.⁵⁷
7. **Adoption of a Clear Standard for Determining Inability to Pay.** Biloxi Municipal Court judges will find that a person is "unable to pay" a fine or fee if, in the totality of the

⁵⁰ *See id.* Exhibit A, Exhibit B.

⁵¹ *See id.* ¶ 12.

⁵² *See id.* Exhibit A at 2; Exhibit B at 2.

⁵³ *See id.* Exhibit A at 5; Exhibit B at 2.

⁵⁴ *See id.* Exhibit B at 1.

⁵⁵ *See id.* ¶ 12(b); Exhibit B at 2.

⁵⁶ *See id.* ¶ 1(b); Exhibit A at 2; Exhibit B at 1.

⁵⁷ *See id.* ¶ 1; Exhibit A at 2.

circumstances, payment will impose “substantial hardship” on the person or her dependents. Judges will presume that a person is “unable to pay” when she earns below 125% of the relevant Federal Poverty Guideline, is homeless, is incarcerated, or resides in a mental health facility.⁵⁸ Any finding that a person is able to pay must be supported by evidence in the record, and all findings and supporting evidence must be made on the record or in writing.

8. **Limitation on Jail for Nonpayment.** The Biloxi Municipal Court will not impose a jail sentence for nonpayment unless it finds, based on evidence in the record, that a person willfully failed to pay (i.e., that the person had the resources to pay, but did not do so), that a person failed to make sufficient bona fide efforts to secure the money by earning or borrowing it, or that a person is unable to pay, but alternatives to incarceration are not adequate.⁵⁹ Judges are required to be mindful of the Supreme Court’s recognition in *Bearden* that the government’s interest in punishment and deterrence can often be served by alternatives to jail.⁶⁰
9. **Limitation on Third Party Collections.** The Biloxi Municipal Court will only send a case to collections by a third party, private debt collector that uses civil debt collection mechanisms after holding a Compliance Hearing and determining that nonpayment was willful or that the person failed to make bona fide efforts to acquire the money to pay.⁶¹
10. **Robust Procedural Protections Before Reporting Nonpayment Pursuant to Driver’s License Suspension Statute.** The Biloxi Municipal Court will report people for failure to “timely pay” traffic fines and fees to the Mississippi Commissioner of Public Safety as required by Miss. Code Ann. § 63-1-53 only after holding a Compliance Hearing concerning the nonpayment charge.⁶² This ensures that Biloxi abides by its statutory obligation to report those who have not “timely paid,” while protecting against the unnecessary suspension of driving privileges for people whose nonpayment was not willful.⁶³

The policy reforms adopted by Biloxi are meaningful and transformative. They provide workable standards and guidelines for protecting constitutional rights while imposing and collecting fines and fees. They eliminate profit-motivated actors and return judges, court staff, probation officers, police, and public defenders to their roles as public servants.

These reforms address every recommendation made by the U.S. Department of Justice earlier this week when it issued a letter calling on State Chief Justices and Court Administrators to

⁵⁸ *See id.* Exhibit A at 4; Exhibit B at 3.

⁵⁹ *See id.* Exhibit B at 3.

⁶⁰ *Id.*

⁶¹ *See id.* Exhibit A at 6; Exhibit B at 4.

⁶² *See id.* ¶ 1(g).

⁶³ Miss. Code Ann. § 63-1-53.

ensure their court rules and procedures comply with due process, equal protection, and sound public policy.⁶⁴

Municipalities and municipal court judges around the country should heed the call of the Department of Justice. Biloxi has given them a clear roadmap on how to do so.

VII. Recommendations for the U.S. Commission on Civil Rights

We comment the Commission for holding this briefing on whether pressures to generate revenue are distorting the role of municipal policing and courts. The ACLU's work across the country shows that this problem is prevalent in a wide variety of places with serious and negative consequences on people involved in justice systems, their families and communities, and the public at large.

We urge the Commission to take three further steps to address this problem.

First, we request that the Commission issue a written report on this briefing that highlights: (1) specific municipal practices that lead to the jailing of low-income people in violation of their constitutional rights, including those fostered by pressure to raise municipal revenue; (2) the negative consequences of such practices on low-income communities, communities of color, and public safety; and (3) the prevalence of these practices nationwide.

Second, we urge the Commission to recommend best practices that municipalities and municipal courts should adopt to ensure that their justice systems protect constitutional rights in the imposition and collection of fines and fees. We encourage the Commission to support the Biloxi reforms as a model for other cities to follow.

Finally, we request that the Commission hold an additional briefing on the role of for-profit companies, including for-profit probation companies, in municipal policing and court practices and the way in which profit motives distort the justice system's ability to administer justice fairly and equally.

We thank the Commission and look forward to continued discussions of these issues of public concern.

⁶⁴ U.S. Department of Justice, Civil Rights Division, Letter from Principal Deputy Assistant Attorney General Vanita Gupta and Director Lisa Foster to State Chief Justices and Court Administrators Concerning the Enforcement of Fines and Fees in State and Local Courts (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.