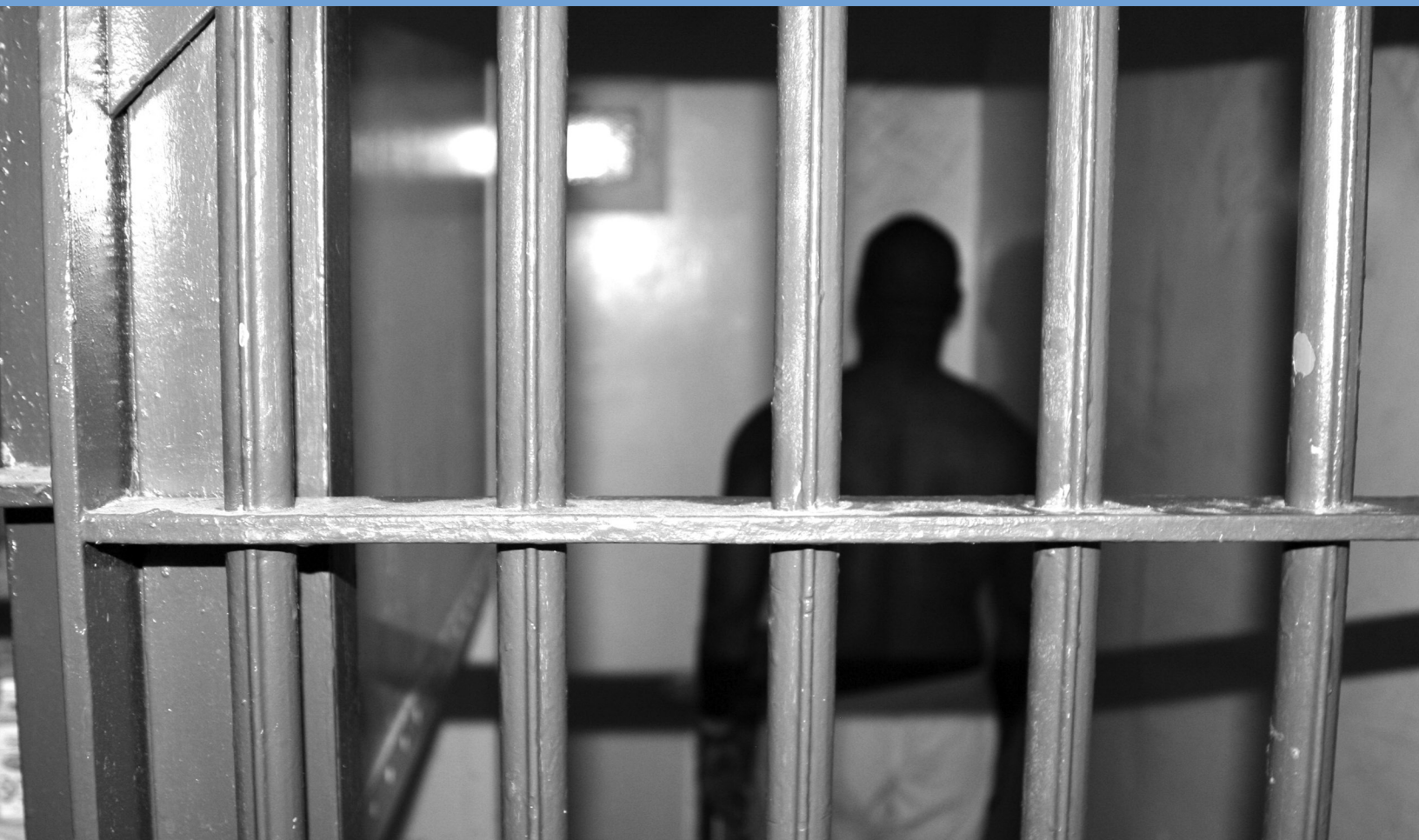


IN FOR A PENNY

The Rise of America's New Debtors' Prisons



A report by the
American Civil Liberties Union

OCTOBER 2010

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EXECUTIVE SUMMARY

In October 1980, Danny Bearden was sentenced to three years of probation and ordered to pay \$750 in fines and restitution for burglary and receiving stolen property, \$200 of which was due almost immediately. Mr. Bearden borrowed enough money from his parents to make a partial payment to the court, but soon fell behind when he was laid off from his job about a month after his conviction. Mr. Bearden, who was illiterate and had not attended school beyond the ninth grade, was unable to find work again. In June 1981, his probation was revoked because he had been unable to pay the \$550 he still owed the court, and he was sentenced to serve the remainder of his probation term in prison. For two years, he languished behind bars. But in 1983, the Supreme Court of the United States issued a decision that set him free. The Court ruled that imprisoning a probationer who, through no fault of his own, had been unable to pay his debts despite making bona fide efforts to do so violated the Equal Protection Clause of the Fourteenth Amendment. The Court held that sentencing courts must inquire into a defendant's reasons for failing to pay a fine or restitution before sentencing him to serve time in prison; to imprison someone merely because of his poverty would be fundamentally unfair.¹

Today, courts across the United States routinely disregard the protections and principles the Supreme Court established in *Bearden v. Georgia* over twenty years ago. In the wake of the recent fiscal crisis, states and counties now collect legal debts more aggressively from men and women who have already served their criminal sentences, regardless of whether they are able to pay these debts. In this report, *In For A Penny: The Rise of America's New Debtors' Prisons*, the ACLU presents the results of its yearlong investigation into our modern-day "debtors' prisons." The report shows how, day after day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage. In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them. These sentences are illegal, create hardships for men and women who already struggle with re-entering society after being released from prison or jail, and waste resources in an often fruitless effort to extract payments from defendants who may be homeless, unemployed, or simply too poor to pay.

Key Findings

The ACLU investigated the assessment and collection of legal financial obligations (LFOs)—a general term that includes all fines, fees, and costs associated with a criminal sentence—in five states: Louisiana, Michigan, Ohio, Georgia and Washington. The following are the ACLU's key findings on the damage debtors' prisons do to our citizens, our local and state economies, and our criminal justice system:

Debtors' Prisons Come With Devastating Human Costs

Incarceration has a devastating effect on men and women whose only remaining crime is that they are poor. Upon release, they face the daunting prospect of having to rebuild their lives yet again. Even for those men and women with unpaid LFOs who do not end up back behind bars, their substantial legal debts pose a significant, and at times insurmountable, barrier as they attempt to re-enter society. They see their incomes reduced, their credit ratings worsen, their prospects for housing and employment dim, and their chances of ending up back in jail or prison increase. Many must make hard choices each month as they attempt to balance their needs and those of their families with their LFOs. They also remain tethered to the criminal justice system—sometimes decades after they complete their sentences—and live under constant threat of being sent back to jail or prison, solely because they cannot pay what has become an unmanageable legal debt. This report highlights the experiences of dozens of men and women who have been ensnared in the criminal justice system, some of whom ended up incarcerated, merely because they were too poor to manage their LFOs:

- In **Louisiana**, the ACLU profiles Sean Matthews, a homeless construction worker who was assessed \$498 in fines and costs when he was convicted of possession of marijuana in 2007. He was arrested two years later after failing to pay his LFOs, and spent five months in jail at a cost of more than \$3,000 to the City of New Orleans. We also profile Gregory White, a homeless man who was arrested for stealing \$39 worth of food from a local grocery store. He was assessed \$339 in fines and fees, which were later converted into a community service sentence after he was jailed because he could not pay his fines. Mr. White spent a total of 198 days in jail because he was unable to pay his LFOs and could not afford the bus fare to complete his community service. In all, his incarceration cost the City over \$3,500.
- In **Michigan**, the ACLU profiles Kawana Young, a single mother of two young sons, who was arrested in March 2010 for failing to pay LFOs connected with several minor traffic offenses. Ms. Young was ordered to pay \$300 or spend three days in jail for one of her offenses. She was unable to pay, having been recently laid off and unable to find work again, but the judge refused to allow her to pay on a payment schedule and remanded her back to jail for three days. Because she was sent back to jail, Ms. Young was charged a booking fee and a daily fee for her room and board, LFOs she would not have incurred had she been able to pay her \$300 fine on the day she was sentenced. We also profile Walter Riepen. In late 2009, Mr. Riepen was sentenced to 30 days in jail and probation for a misdemeanor. Within days of his release, he received a letter from a private collections agency working for the state that contained a bill for \$60 per day for his jail stay, for a total of \$1260. Mr. Riepen's only income is a monthly social security disability payment, he has no funds to pay down the \$1260 for his room and board, and he lives under the threat of being sent back to prison due to his unpaid LFOs.

- In **Ohio**, the ACLU profiles Howard Webb, who was thrown in jail no fewer than four times over a six-year period for failing to pay \$2,882.36 in LFOs assessed for various criminal and traffic offenses. During these years, Mr. Webb, a dishwasher earning \$7 per hour, entered into several payment plans, made some payments, signed up for community service, and also wrote numerous letters to the court asking for early release so that he could keep his employment and make payments. The court denied all his requests, noting that it would only release him “if the court receives all the money he owes.” In all, Mr. Webb served 330 days in jail. Had the judge followed state law requiring that Mr. Webb be credited for \$50 a day toward his LFO debt for each day he was incarcerated, his time in jail would have covered \$16,500 in fines—more than five times what he owed in LFOs. We also profile Yolanda Twitty, who was assessed \$251 in fines and costs for unauthorized use of property, a fourth-degree misdemeanor that carries a maximum sentence of 30 days. Ms. Twitty was arrested four different times when she was unable to pay her LFOs. She served a total of 35 days in jail without receiving any credit toward her debt, five days longer than the maximum sentence she could have received for her underlying offense.
- In **Georgia**, the ACLU profiles “Beth,” who was arrested and placed on probation at \$40 a month when she was a juvenile after she stole some school supplies. Though Beth suffers from mental illness and was under her mother’s care, she was transferred to the adult probation system when she turned seventeen. Her probation officer refused to keep Beth’s mother—who had paid her probation charges and made sure she kept all of her appointments and court appearances—informed of Beth’s obligations. Beth missed several LFO payments and court appearances and was arrested for violating her probation. Without an attorney present, the judge ordered that Beth be jailed without determining if she had the means to pay her probation fees. Beth was released only after her mother came up with enough money to get her out. Overall, Beth has been charged \$4,000 plus probation fees and had her social security disability income revoked for missing LFO payments. We also profile Ora Lee Hurley, who was found to be in violation of probation and sentenced to a jail diversion facility for a minimum of 120 days or until she paid back a \$705 fine from a 1990 drug possession conviction. Ms. Hurley remained locked up eight months after she completed her 120-day sentence solely because she was unable to pay her fine.

“The Constitution is completely ignored. If you’re never exposed to it, you think everything’s okay. That’s where we were for a long time, and then one day . . .”

— JANE RIEPEN, whose husband was charged \$1260 for the costs of his incarceration

- In **Washington**, the ACLU profiles four men and women as they struggle to manage their legal debts. One of them is “Nick,” a 38-year-old African American man who has struggled with drug addiction and mental health problems since he was a teenager. Nick accumulated a total of \$3,178 in LFO debt to the state, for which he established a monthly payment plan. After failing to make two monthly payments totaling \$60, Nick was incarcerated for two weeks in the county jail at a cost to the county of approximately \$1,720. We also profile “Lisa,” whose legal debts have grown to over \$60,000 due to the state’s interest penalty on unpaid LFOs. Though she has been crime-free for nine years, Lisa has been arrested and incarcerated four times because of her unpaid LFOs, including two times when she was not provided with an attorney before the judge ordered her to be jailed. On one occasion, she was jailed even though she told the judge that her lights had recently been turned off in her apartment because she did not have the money to pay her electricity bill. Lisa now works with current and ex-offenders in a re-entry program. Because she remains under court supervision for her LFOs, she was denied access several times to local detention facilities to speak with her clients.

Debtors’ Prisons Waste Taxpayer Money and Resources

“I mean \$30 a month . . . it’s just the fact that it’s indefinite. How am I going to pay all that back? I owe child support, I owe LFOs, and I owe other bills. I can’t get a clean slate. I understand I committed a crime, I did my time. Okay. I understand that. But, to come after someone from 1991, 1992, 1997, that’s ridiculous.”

— NICK, who was imprisoned for two weeks for failing to pay \$60 worth of fines

Imprisoning those who fail to pay fines and court costs is a relatively recent and growing phenomenon: States and counties, hard-pressed to find revenue to shore up failing budgets, see a ready source of funds in defendants who can be assessed LFOs that must be repaid on pain of imprisonment, and have grown more aggressive in their collection efforts. Courts nationwide have assessed LFOs in ways that clearly reflect their increasing reliance on funding from some of the poorest defendants who appear before them. For example, courts in rural Michigan counties are more aggressive in assessing and collecting court costs and defender fees—which go directly into county coffers—than fines, which are deposited into a statewide fund. Because many court and criminal justice systems are inadequately funded, judges view LFOs as a critical revenue stream. In New Orleans, for example, LFOs account for almost two-thirds of the criminal court’s general operating budget. One town in Ohio with a population of 60 collected more than \$400,000 in one year in LFOs assessed in its mayor’s court, one

of many largely unregulated traffic and municipal ordinance courts in the state with a well-earned reputation for assessing exorbitant fines and fees to pad local budgets.

Although states and counties view LFOs as much-needed revenue, they do not systematically gather and produce data showing that their efforts to collect unpaid legal debts actually make money. In fact, incarcerating indigent defendants unable to pay their LFOs often ends up costing much more than states and counties can ever hope to recover. In one two-week period this May, 16 men in New Orleans were sentenced to serve jail time when they could not pay their LFOs. If they served their complete sentences, their incarceration would cost the City of New Orleans over \$1,000 more than their total unpaid legal debts. In Washington, one man was jailed for two weeks for missing \$60 in LFO payments. In Ohio, a woman was held in jail for over a month for an unpaid legal debt of \$250.

Incarcerating indigent men and women only diminishes their ability to repay their legal debts, and the disruption in their lives and the lives of their families and loved ones can lead to increased public costs when they are forced to use social welfare programs to survive. Even when defendants are not incarcerated, the costs of collection efforts can make seeking unpaid LFOs cost-ineffective, since issuing warrants, conducting hearings, and using collections agents and law enforcement officials to locate and detain debtors all cost money.

Debtors' Prisons Undermine Our Criminal Justice System

This new push for revenue has also undermined the integrity of the court system. The former chief judge of the New Orleans criminal court acknowledged that it creates an appearance of impropriety when judges must rely in part on collecting LFOs from poor defendants to keep their courts running. Judges in that court were pressured by their colleagues to collect LFOs, and those who collected less than their “fair share” were provided with fewer operating funds. In Ohio, the late chief justice of the Ohio Supreme Court called for the elimination of local mayor’s courts, recognizing “the inherent conflict in a system that permits the person responsible for the fiscal well-being of a community to use judicial powers to produce income that supports th[at] well being.” Additionally, Ohio’s state disciplinary counsel took the extraordinary step of disciplining one of its judges for repeatedly imprisoning poor defendants who could not pay their LFOs despite their best efforts to do so.

The imposition of LFOs—particularly the “pay-to-stay” and booking fees charged once a defendant is incarcerated—disproportionally affects racial and ethnic minorities, because they are disproportionately represented among the prisoner population. In 2007, 38% of the nation’s 1.5 million prison inmates were black and 21% were Hispanic,² despite the fact that these groups only represent 12% and 15% of the general population, respectively.³

But racial disparities exist at every stage of our criminal justice system, not just in our prisons and jails. The U.S. Court of Appeals for the Ninth Circuit recently recognized that in Washington State, the criminal justice system is “infected with racial bias.”⁴ The court found that African-Americans and Latinos in the state were disproportionately arrested for drug possession and delivery, far more likely to be searched, and less likely to be released without bail than their white counterparts.⁵ These same disparities extend to the assessment of LFOs: In Washington, Hispanic defendants generally receive higher LFOs than white defendants convicted of similar offenses, and persons convicted of drug offenses receive significantly higher LFOs than those convicted of violent crimes.

Debtors’ Prisons Create a Two-Tiered System of Justice

The courts’ newfound vigor in assessing and collecting LFOs has done more than just tarnish their reputation and integrity. It has created a two-tiered system of justice in which the poorest defendants are punished more harshly than those with means. Although courts attempt to collect LFOs from indigent and affluent defendants alike, those who can afford to pay their legal debts avoid jail, complete their sentences, and can move on with their lives. Those unable to pay end up incarcerated or under continued court supervision. Perversely, they also often end up paying much more in fines and fees than defendants who can pay their LFOs. Poor defendants who are re-arrested and incarcerated for failing to pay their LFOs face added costs, such as warrant fees, as well as booking and jail “pay-to-stay” fees. Some states and counties have particularly insidious penalties reserved for the poor: To make up for budget shortfalls, some counties in Georgia aggressively pursue fines and fees in their traffic courts, and refer those defendants who cannot immediately pay to private probation supervision companies, which charge monthly fees that often double or triple the amount of money a probationer would have paid had he or she been able to afford the fine. In Washington State, all unpaid legal debts are subject to 12% interest. Since most Washington defendants who have been convicted of a felony cannot afford to pay their legal debts in full, and must resort to making small periodic payments, this interest penalty can turn what starts as a modest fine into a lifetime debt: a criminal defendant who is assessed the average LFO for a felony and who makes a typical monthly payment on that LFO would still have a legal debt, and would remain ensnared in the criminal justice system and under threat of imprisonment, 30 years after his conviction.

Recommendations

At the end of each state section, the ACLU has made recommendations to state and local officials to remedy the most serious abuses that have resulted from debtors' prisons in that particular jurisdiction. These recommendations seek to ensure that the following principles are adhered to:

1. Defendants should not be incarcerated for failing to pay fines, fees, and costs that they cannot afford, and must be afforded the same protections as civil judgment debtors.
2. Courts must consider a defendant's ability to pay when determining whether to assess fines, fees, and costs, and when deciding whether a failure to pay is willful.
3. States should repeal all laws that may result in poor defendants being punished more severely than defendants charged with the same offenses who have means. This includes statutes authorizing courts to charge fees to indigent defendants who are appointed counsel, and statutes that impose penalties or interest on unpaid LFOs.
4. Consistent guidelines regarding determination of indigence and policies for assessing and collecting LFOs should be implemented in every jurisdiction to guard against arbitrary or racially skewed discrepancies in punishment.
5. Judges and other court officials should receive training in and comply with federal and state laws that prohibit incarceration of defendants who are too poor to pay LFOs and require a determination of ability to pay before incarceration. Judges should appoint counsel to defendants at proceedings to determine whether to impose or modify LFOs, or whether to sanction defendants for nonpayment. Defendants should be given the opportunity to repay their debts through alternative methods such as community service.
6. All jurisdictions should collect and publish data regarding the assessment and collection of LFOs, the costs of collections (including the cost of incarceration), and how collected funds are distributed, broken down by race, type of crime, geographical location, and type of court.
7. Courts should be adequately funded so they do not have to rely on the collection of LFOs for a substantial portion of their operating budgets.

The federal government also has a role to play to ensure that the constitutional guarantees announced in *Bearden* are consistently followed. Therefore, the ACLU calls on the U.S. Congress to hold oversight hearings on the rise in debtors' prisons.

METHODOLOGY AND ACKNOWLEDGEMENTS

In April 2009, Edwina Nowlin contacted the ACLU of Michigan after she was jailed because she failed to comply with a court order to pay \$104 per month in lodging fees to the detention facility where her son was housed. At the time the court ordered her to make these payments, Ms. Nowlin was homeless and working part-time. Ms. Nowlin was released from jail after the ACLU of Michigan agreed to represent her and filed an emergency petition on her behalf.

Following Ms. Nowlin's release, the ACLU National Prison Project (NPP) and ACLU Racial Justice Program (RJP) launched an investigation to determine how widespread and common her experience was across the county. In July 2009, the NPP and RJP sent out a survey query to all state ACLU affiliates asking them to provide any information they had on debtors' prisons in their state, including the names of public defenders or attorneys who had clients either jailed or threatened with incarceration due to their failure to pay LFOs. The NPP and RJP had a similar query posted on a national listserv maintained by the National Legal Aid and Defender Association.

In August-November 2009, the NPP and RJP reviewed the responses they had received to their queries, called each affiliate that had not responded, and conducted follow-up phone calls with dozens of attorneys, public defenders, and local advocates. Based on these responses, the NPP and RJP narrowed their investigation to a handful of states that would be the focus of this report. The NPP and RJP also retained Alexis Harris, Ph.D., assistant professor of sociology, University of Washington, to draft the Washington State section of this report, focusing on case studies and clinical interviews of men and women who had completed their criminal sentences and were attempting to manage their legal debts after their release.

From December 2009 to July 2010, the NPP and RJP, aided by ACLU affiliate staff, law students, volunteer attorneys, and law professors, continued their investigation regarding LFO assessment, collection, and enforcement practices in the five states covered in this report. This work included reviewing case dockets and pleadings from local and state courts in each state; and speaking with public defenders, judges, court administrators and staff, and personnel at local diversion, rehabilitation, and prisoner re-entry programs. We also interviewed current and former prisoners who were either jailed because of their failure to pay LFOs, or were attempting to manage their legal debts after being released. In April 2010, NPP staff traveled to Louisiana to launch a court-watching program administered by two law professors at Tulane Law School that thereafter had students, a professor, and volunteers sit in on local court proceedings in Orleans Parish, Louisiana. The NPP and RJP also filed state public records requests to gather information on LFO assessments, collections, and enforcement practices in Michigan and Louisiana.

The principal authors of this report are Sarah Alexander, Litigation Fellow, ACLU National Prison Project; Yelena Konanova, Litigation Fellow, ACLU Racial Justice Program; and Deuel Ross, Karpatkin Fellow, ACLU Racial Justice Program. Alexes Harris, Ph.D., assistant professor, Department of Sociology, University of Washington, is the principal author of the Washington State section.

Vanita Gupta, director, ACLU Center for Justice, and Eric Balaban, senior staff counsel, NPP, directed the investigation and writing of this report, and were its primary editors. Willa Tracosas of the ACLU National Office is responsible for the report's design. This report was also reviewed at the NPP by David Fathi, director; Margaret Winter, associate director; and Carl Takei, staff counsel; and at the ACLU Center for Justice by Anjuli Verma, senior program strategist; Rachel Bloom, state strategies coordinator; and Rebecca McCray, legal assistant. RJP Legal Intern Laura Jones helped conduct a thorough review of the report and RJP Legal Assistants Marika Plater and Salima Tongo provided exceptionally useful help on the project. The authors gratefully acknowledge the following persons for their invaluable help in the research and writing of this report:

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Most of all, we thank the men and women who shared their experiences with us for this report, all of whom struggle daily to manage their LFOs.

LOUISIANA

“Now, how can you describe a system where the City pays \$23 a day to the Sheriff to house someone in the Jail for 30 days to collect \$100 as anything other than crazy?”

—HON. CALVIN JOHNSON, former chief judge,
Orleans Parish Criminal District Court

I. LFOs in New Orleans

New Orleans, the seat of Orleans Parish, is one of Louisiana’s most populous cities. It also has the highest incarceration rate of any major city in the United States—three times the national average in 2009.⁶ Orleans Parish Prison (OPP), the notorious New Orleans jail, holds men and women accused of every imaginable crime—as well as those whose only crime is that they are too poor to pay their legal debts.

The Louisiana state constitution does not specifically prohibit imprisonment for debt, but debtors’ prisons were abolished by statute in 1840⁷ and Louisiana courts have since held that “[a]n indigent defendant may not be subjected to imprisonment because he is unable to pay a fine which is a part of his sentence,” and have “considered it error for a trial court to impose jail time for failure to pay court costs.”⁸ In spite of this, all of the criminal courts of Orleans Parish impose fines and fees regardless of a defendant’s ability to pay them. A court need only inquire into a defendant’s reasons for nonpayment and consider alternatives to incarceration if the defendant appears in court to assert his inability to pay.⁹ And in practice, such determinations rarely occur.¹⁰ Even before any finding of guilt or innocence, defendants—or their friends and families—may already have posted bond and been assessed a \$40 fee for the appointment of a public defender. Some defendants are told they must pay this fee before counsel will be appointed.¹¹ If convicted, defendants face fines, court costs, and a host of fees that fund the operation of the justice system. The office of the public defender, the courts’ general fund, the law enforcement fund, and other criminal justice funds all receive portions of the fines and fees collected from defendants.¹²

When defendants are unable to pay their fines, fees and costs, they may be incarcerated. The court monitors a defendant’s payment progress by scheduling hearings at which the defendant must appear to make payments, ask for an extension, or otherwise explain his situation to the court. Those who cannot afford to make timely payments according to the schedule determined by the court are assessed a late fee of \$100, meaning that the poorest defendants

may be faced with the highest debts overall.¹³ Defendants may also be held in contempt for nonpayment and sent to jail, typically for five to thirty days, regardless of whether their failure to pay is willful or solely because of their poverty. According to Derwyn Bunton, chief public defender for Orleans Parish, this is the most common way for someone to be reincarcerated for his or her inability to pay; it happens every day.¹⁴ Payment of LFOs is also frequently made a condition of a defendant's probation, without any inquiry into whether he has the resources to pay, and nonpayment (especially of supervision fees assessed by the probation department) can result in a violation that sends the defendant back to jail or prison to serve his or her full term.¹⁵

Defendants may also be required to participate in diversion or treatment programs as a condition of probation. These programs come with very high costs—on the order of \$600 per month—which many defendants can never hope to pay.¹⁶ When a defendant can no longer pay the required fees, he is dropped from the program—and because he can no longer attend, he is deemed to have violated the terms of his supervision and may face jail time. As Chief Defender Bunton puts it, the defendant is sent back to jail “not because he started using drugs or alcohol in violation of the treatment program, but because he could not afford the treatment itself.”¹⁷ When people are dropped from these programs for nonpayment, the debt they have accumulated participating in the programs remains, leaving them with legal financial obligations even greater than those they might have incurred had they simply pled guilty and been sentenced to jail.¹⁸

The assessment and collection of LFOs from indigent defendants may have a racially disparate impact in New Orleans. Post-Katrina, New Orleans continues to be one of the poorest metropolitan areas in the country, with 23% of its population living below the poverty line in 2008.¹⁹ Historically, that poverty has been concentrated in residentially segregated African

American communities; those communities have in turn been disproportionately incarcerated.²⁰ Unfortunately, the Orleans Parish Sheriff has refused to release data that would make it possible to assess exactly how many New Orleanians are incarcerated for their debts each year, let alone how many of them are people of color.

The City of New Orleans pays \$22.39 per day to the Sheriff for each detainee housed in the Orleans Parish Prison. Thus, the five months Sean Matthews spent incarcerated there waiting to see a judge cost the City \$3,201.77—more than six times the \$498 legal debt he owed.

The Cost of Collections in Orleans Parish Criminal Court

Sean Matthews, a temporary construction worker who lives with various family and friends because he has no home of his own, was arrested on February 9, 2007, and pled guilty to possession of marijuana on September 13.²¹ He was assessed a \$300 fee for the Judicial Expense Fund, \$148 in court costs, and a \$50 fee for the Law Enforcement Fund. He was unable to pay his fines and fees, and was arrested two years later on September 1, 2009.²² When he was taken into custody, no one could tell Mr. Matthews when he would be brought to court; after a couple of weeks, he simply stopped asking. He was unable to get in touch with his family from jail, although he did once manage to reach his uncle, who “didn’t care” and hung up on him.²³ Finally, on January 21, 2010, after spending almost five months in jail, Mr. Matthews was brought to court, where the judge waived his fines and fees and ordered his release.²⁴

The City of New Orleans pays \$22.39 per day to the Sheriff for each detainee housed in the Orleans Parish Prison.²⁵ Thus, the time Mr. Matthews spent incarcerated at Orleans Parish Prison (OPP) waiting to see a judge cost the City \$3,201.77—more than six times the \$498 legal debt the court eventually waived. Additionally, the indirect costs associated with Mr. Matthews’s case—including the costs incurred by law enforcement in carrying out his arrests, the costs incurred by the court in conducting hearings and staffing the collections office, and certain additional reimbursement payments the City makes to the Sheriff²⁶—drive the total cost even higher.

Mr. Matthews’s story is by no means unique: courts routinely incarcerate defendants who are unable to pay, and in the process rack up costs completely out of proportion to the amounts they hope to gain in LFOs, if they are ever paid. Javon Perrymon was arrested for possession of marijuana on February 13, 2009.²⁷ He entered a guilty plea in the Magistrate section of the Criminal District Court on April 28, 2009, and was sentenced to six months of probation. He was also assessed a \$250 fee for the Judicial Expense Fund, a \$50 fee for the Law Enforcement Fund, and \$148 in court costs. He was unable to pay the \$448 he owed to the court, and an arrest warrant was issued against him on January 13, 2010. Mr. Perrymon was arrested on March 10.²⁸ During Mr. Perrymon’s status hearing on March 23, his public defender argued that because he had no money with which to pay, he should be released from jail—but the commissioner presiding over the hearing responded that someone in Mr. Perrymon’s family should be able to make a payment. Mr. Perrymon’s attorney called his client’s family members and his girlfriend, but no one was able to pay. Mr. Perrymon was sent back to jail.²⁹

When Mr. Perrymon was brought to court again on March 30, he once again tried to explain to the court that he had no way to pay his debt. The judge ordered Mr. Perrymon returned to jail for another week. When Mr. Perrymon’s attorney informed the commissioner that he intended to appeal the decision, the commissioner called him up to the bench and informed him that he intended to release Mr. Perrymon sometime during the next week—before the appeal could

reasonably be filed—and that he was simply imposing jail time as a way to show Mr. Perrymon that failure to pay was a serious offense.³⁰ Mr. Perrymon was released on April 6, 2010, and told to make a payment and come back to court on April 13.³¹ The City of New Orleans has thus paid the Sheriff \$626.92 to incarcerate Mr. Perrymon to punish him for being unable to pay \$448 in fines and fees.

Mr. Perrymon's experience is typical of defendants in magistrate court, which handles various misdemeanor offenses: fines and fees of around \$500 are routinely imposed without a hearing to determine the defendant's ability to pay.³² When indigent defendants are unable to keep to the scheduled payment plan, they are arrested and often sentenced to spend a certain number of days in jail, or made to wait until a friend or family member can raise enough money to pay for their release. But defendants' families are rarely in a better position to pay, and efforts to collect outstanding fines and fees from them are no less costly than attempts to exact the money from defendants themselves.

Leroy Sorden spent over a month in jail after he could not make a \$100 LFO payment. At the time he was jailed, Mr. Sorden was unemployed and was using food stamps to feed himself, his mother, and six siblings.

Many defendants keep up payments for a period of time. But the specter of jail time for missing payments always looms over them. Leroy Sorden, a young man who helps his unemployed mother care for his six younger siblings, pled guilty to possession of crack cocaine on April 22, 2009. He received a suspended sentence of two years, followed by two years of probation, and was assessed a \$1,000 fee to the Judicial Expense Fund. He made a \$100 payment a month after his guilty plea, but was unable to make his next scheduled payment because he was unemployed and relied on food stamps to feed his family, with whom he lived in a two-bedroom apartment rented with housing assistance. He was subsequently arrested on August 27 for failure to pay his fee. He waited in jail until he was brought

to court on October 8, where he explained to the judge that he could not pay because he was unemployed. After being released, Mr. Sorden found a job working as a security guard one night a week, and used the \$150 he earned to help support his family, buy necessities, and pay off his legal financial obligations. The debt "cut into [his] life" and left him with very little income, but he made regular payments, appeared in court to ask for an extension when he needed one, and once borrowed \$25 from his grandmother in Mississippi to ensure he could meet his obligations. Yet more than a year after his original sentencing, Mr. Sorden still owes around \$600.³³

The costs to the City to jail poor defendants who cannot pay modest legal debts are compounded by the time and resources expended by courts and law enforcement to track down defendants

who have missed payments. Often, defendants are dragged back into court for failing to pay fines and fees they incurred from minor offenses they committed many years ago. Jacob Jones was arrested on February 1, 2002, for possession of marijuana, and posted a \$500 bond. He failed to appear for arraignment, and was arrested again—more than seven years later—on August 12, 2009. He pled guilty to the possession charge on August 24 and was sentenced to 90 days at Orleans Parish Prison and six months of probation. He was assessed a \$100 fine, \$148 in court costs, and a \$50 fee for the Law Enforcement Fund. On September 21, 2009, he appeared without counsel for his status hearing, and asked for an extension on his payments until October 19, which was granted. He was arrested on October 24 after he failed to appear for his hearing. After spending 31 days in jail (at a cost of \$694.09 to the City) Mr. Jones was brought to court on November 23, again without counsel. The presiding commissioner told him that he would be released if he made a payment on the \$298 he owed in fines and fees.³⁴ Mr. Jones's girlfriend came to court and tried to make a \$60 payment, but the commissioner refused it, saying it was not enough. Mr. Jones was sent back to jail, and was only released when his girlfriend was eventually able to make a \$100 payment. Mr. Jones had paid off all of his fines and fees as of March 25, 2010, but his contribution will not cover even half of what the City spent trying to collect them.³⁵

The costs to the courts and the City to pursue and incarcerate poor defendants unable to pay their legal debts also pales in comparison to the human cost borne by the defendants themselves. Because they are able to make only small payments toward their fines and fees, many of these men and women can remain ensnared in the criminal justice system for years, and they may find themselves back in jail when their legal debts become unmanageable. Torey Tobias was trapped in the system for almost six years after pleading guilty to possession of marijuana in October 2004. He was assessed \$748 in fines and fees, and made regular payments of between \$24 and \$50 to the court through 2005, lowering his total debt to \$434. When he fell behind on his payments in 2006, the court issued a warrant for his arrest. He was arrested in November 2008 and released 18 days later when he made another partial payment. He fell behind again in January 2009. A year later, in January 2010, he was arrested and spent another ten days in jail. He was released when the court decided to waive his remaining \$434 in fines and fees.³⁶ In all, the City paid the Sheriff \$626.92 over five years to incarcerate Mr. Tobias for his unpaid LFOs.

Judges need not impose fines and fees upon defendants who have no means to pay, particularly since they have the discretion to convert these costs to a community service requirement. But as Chief Defender Bunton explained, many judges mechanically impose fines and fees without regard to the individual circumstances of the defendant: "I recall having one client who was assessed a \$400 fine for a marijuana offense. When she argued that she couldn't pay the fine, the judge could not come up with an alternative penalty: The court just short-circuited. It was so hard for the judge to even consider an alternative to assessing fees and fines that she just reset the sentencing hearing for a week later, and said she would speak to her colleagues."³⁷

Even when community service requirements are imposed in place of fines and fees, indigent defendants can have difficulty meeting those requirements due to cost. Gregory White, one such defendant, lost contact with his family in Hurricane Katrina and has since worked odd jobs cutting grass and washing dishes, occasionally receiving food from people he knows. Three years ago, he was evicted from the apartment he found with the help of a non-profit group that assists the homeless, and moved into an abandoned house in Algiers, a neighborhood in New Orleans.³⁸ On October 18, 2009, he was arrested for stealing \$39 worth of food from a Sav-A-Lot. He was unable to pay his \$3,000 bond, and spent almost eight weeks in jail before he was brought to court and entered a guilty plea on December 10. He was assessed a \$200 fee for the Judicial Expense Fund, a \$100 fee for the Indigent Transcript Fund, and \$39.92 in restitution for the food he stole.³⁹ He did not tell anyone at the court that he would be unable to pay, because “I just wanted to get out of this hellhole [OPP].”

Mr. White was arrested again on January 25, 2010, for squatting in an abandoned house, the only place that he could find to stay. His public defender had not been able to get in touch with him to offer assistance in procuring social services, because Mr. White did not have a phone.⁴⁰ When he was brought to court on January 29, the judge converted his fines and fees to 100 hours of community service. Mr. White was released from jail that evening, but the community service office was closed. He returned to the Algiers section of New Orleans, and never returned to the courthouse or the community service office because he did not have enough money to pay the bus fare. Mr. White was arrested again on March 14, and brought to court four days later. When Mr. White’s public defender argued that his probation should not be revoked because he had no money to pay bus fare and thus could not complete his community service, the judge called her to the sidebar, removed her from representation, and demanded another attorney agree to represent him. Mr. White reports that he was then told that he would only serve four days if he waived the hearing and admitted to the allegations. When he did so, however, his probation was revoked and he was returned to prison, where he was scheduled to remain until June 20, 2010.⁴¹ By the time Mr. White was released, he would have spent 198 days in jail, at a cost of over \$3,500 to the City—more than ten times the \$339.92 it hoped to extract from a homeless man who stole less than \$40 worth of food.

Fines or Time in Orleans Parish Municipal Court

Defendants in municipal court—generally charged with low-level public order offenses—are routinely assessed LFOs upon conviction and given a 30-day suspended sentence regardless of their ability to pay (although there is a presumption of indigence if a particular defendant is currently incarcerated).⁴² Judges sometimes allow defendants to do community service as an alternative to paying the fine, but municipal court records show that such alternative sentences are not regularly imposed. A possible explanation for this comes from municipal court personnel, who said that the court puts the burden on the defendant to propose a

community service sentence, and typically determines a defendant's financial status by making quick judgments based on his home address and physical appearance.⁴³ If a defendant fails to pay his fines within the time set by the court (usually thirty days, but municipal court records show that payment deadlines are sometimes as short as two days from the hearing), a warrant issues for his arrest. Once arrested, the defendant is returned to court; if he is still unable to pay the fine, he is usually sentenced to spend a few days in jail—although in some cases a judge will require the full thirty days to satisfy the suspended sentence.⁴⁴

Judge Calvin Johnson, who retired in January 2008 after seventeen years on the bench in Criminal District Court (including two years as Chief Judge), recalled that defendants received “fines or time” sentences “every day” in municipal court.⁴⁵ He also noted that the “fines or time” practices in Orleans Parish municipal court may cost the City more than it collects. Judge Johnson said that during his two-decade tenure on the Orleans Parish criminal bench, defendants regularly were sentenced by the municipal judges to pay \$100 in fines, or serve 30 days in jail. As Judge Johnson explains, “30 days or \$100—that was something I heard every day. Now, how can you describe a system where the City pays \$23 a day to the Sheriff to house someone in the Jail for 30 days to collect \$100 as anything other than crazy?”⁴⁶

In addition to being costly, such “fines or time” sentences are illegal. The U.S. Court of Appeals for the Fifth Circuit, which includes Louisiana, has held that courts may not impose a sentence requiring a defendant to choose between either paying a fine “forthwith” or serving time in jail; there is no justification for imposing such a sentence, as both the state's interest in collecting fines and in rehabilitating offenders and deterring future criminal activity may be satisfied instead by other methods of fine collection, such as an installment plan.⁴⁷ In 2007, a complaint was filed in federal court on behalf of indigent defendants appearing in municipal court in Orleans Parish.⁴⁸ Certain judges in the municipal court at that time frequently imposed “fines or time” sentences that required defendants either to make immediate payment on fines assessed upon their conviction, or to be incarcerated.⁴⁹ The lead plaintiff in the case, Percy Dear, who suffers from epilepsy, schizophrenia and bipolar disorder, was arrested and charged with begging in February of 2007. He pled guilty and was sentenced to pay \$200 immediately or to spend twenty days in the Orleans Parish Prison. When he was unable to pay, he was incarcerated.⁵⁰ The complaint alleged that such “fines or time” alternative sentencing created a system in which indigent defendants would always be forced to accept jail time, while the wealthy would be able to avoid imprisonment.⁵¹ The plaintiffs dismissed their lawsuit in October of 2007 after negotiations with the municipal court resulted in an agreement to put a stop to “fines or time” sentencing.⁵²

To assess whether the courts are still adhering to the *Dear* settlement, Katherine Mattes, director of the Criminal Litigation Clinic at Tulane University Law School, went to observe the court's proceedings during the second week of April 2010, along with Colin Gilland, a contributor to this report. Professor Mattes explains what she saw: “As soon as we opened the door, we heard the judge sentence a defendant to \$150 or 30 days in jail. We then sat down,

and the bailiff came up to us and asked us what we were doing there. We told him we were observing what was happening in court that day. The bailiff then went directly to speak with the judge, and on that day we did not see another defendant get a fines or time sentence.”

As Professor Mattes observed, it appears that there has been some backsliding in municipal court practices since *Dear* was dismissed.⁵³ In March 2010, at least 32 defendants received a fines-or-time ultimatum in municipal court after first receiving a suspended sentence and being ordered to pay a fine. Most of these defendants received ultimatums to serve 10 days or pay between \$100 and \$200 and fines. During the week of May 17, 2010, the court ordered seven defendants to pay a fine or serve jail time. Six were incarcerated. The fines assessed against these six men totaled \$1,100, but their combined sentences—a total of 65 days in jail—will cost the City \$1,455. From May 24 to May 28, 2010, nine defendants were given such sentences, ordered to pay a total of \$1800 in fines or spend a total of 138 days in jail. Seven were incarcerated. If they served their full sentences, the cost to the City would come to \$2,373.34.⁵⁴

One of these men was “Walter,”⁵⁵ who has worked collecting garbage, cleaning barges and cutting grass for the past six years. He was arrested in March 2010, at a bar on Rampart Street, for disturbing the peace and trespass.⁵⁶ His cousin, who had brought him to the bar, had previously been banned from that bar for disorderly behavior. When the bartender saw Walter’s cousin, he called the police—and although the bartender informed the officers that Walter was not causing any trouble, they arrested Walter along with his cousin. A few days later, he was brought before the municipal court and sentenced to pay \$150 or spend 10 days in jail (at a cost to the city of \$223.90). He told the court he had no money, and so he was incarcerated. He lost his job and his apartment, leaving his girlfriend homeless. By the time he was released, his girlfriend had moved to Texas to live with her mother. Walter believes he could have paid the fine in 30 days if he had been allowed to pay in installments.⁵⁷

This is not the first time Walter has been forced to choose between paying fines he cannot afford and being incarcerated. In November 2009, he was arrested after he got into a street fight, and was ordered to pay \$300 or spend 30 days in jail. He was arrested again in March 2010 for public drunkenness at a bar on Bourbon Street, and told to pay \$200 in fines. Because Walter has been in and out of jail, he has had difficulty holding down a job that would allow him to pay his debt. He has made attempts to pay, however, by borrowing money from his mother to try to meet his obligations. Walter believes he has spent close to a year in jail over the course of his life because of his inability to pay fines and fees.⁵⁸

II. Special Focus: New Orleans' Broken Funding Scheme for Its Criminal Justice System

Courts in Orleans Parish could not function without the fines and fees they collect from defendants. As Professor Pamela Metzger of the Tulane University Law School stated, the justice system simply “cannot afford to have fewer crimes.”⁵⁹ Judge Johnson explained that the courts’ reliance on collections is the result of a defective system of funding: “The courts are funded improperly. If courts were funded correctly, this would not be an issue. Courts try to maintain themselves on the backs of the people who use them, which are the poor people. This is just not right.”⁶⁰

When courts attempt to extract their funding from defendants in the form of fines and fees, the burden falls most heavily on those who can least afford it. The poor are captive to a system that punishes poverty with incarceration and can perpetuate recidivism by adding another barrier to re-entry into society for those men and women who face legal debts they cannot meet. As Chief Defender Bunton said: “People start off moving backwards.” Saddling the indigent with debt puts them “in a position of having to do some other bad thing to get the money to keep from going to jail for the first bad thing they did.”⁶¹ Judge Johnson added, “They have a felony conviction and they can’t get a job, but they need the money or they will go to jail, so they consider committing another crime.”⁶²

Without fines and fees collected from defendants, however, the criminal justice system in Orleans Parish would simply cease to function. For fiscal year 2009, the Orleans Parish Criminal District Court projected just over \$4 million in revenues for the court’s general fund—and collected \$1,470,191 from defendants over the course of the year.⁶³ Although some of this money is routed to other funds and agencies, it is clear that collections from defendants provide essential financial support to the Orleans Parish criminal court system. In fact, the rate of collections seems to have accelerated recently: A public records request to the Judicial Administrator of the Criminal District Court of Orleans Parish revealed that from March 1-14 2010, the court collected a total of \$111,522.75 in fines, fees and costs. Over a one-year period, this would translate into \$2.67 million in revenue, or about two-thirds of the court’s annual general fund budget.

This broken funding system for criminal courts in Orleans Parish creates improper incentives for judges to impose and aggressively collect fines and fees. The Judicial Expense Fund, from which district court sections pay for courtroom improvements such as carpeting and microphone systems, is funded mostly by collections of fines and fees.⁶⁴ Judges face pressure from their colleagues to assess and collect more fines and fees. Judge Johnson reported that during his time on the bench, “poor courts”—sections which collect little from defendants—did not have the same amenities as sections that assess fines and fees sufficient to satisfy their needs.⁶⁵ Chief Defender Bunton has seen many cases sped through to conclusion so that courts can collect fines and fees as quickly as possible: “Court operations are volume-

dependent. They want to push as many people through as possible in order to gain economies of scale, which creates untoward incentives. The court needs a lot of traffic fees, and it needs cases to proceed quickly so it can get the money. It's no accident that traffic and municipal court are the biggest revenue sources—they process people faster."⁶⁶ The pursuit of revenue, he explained, can overshadow what should be the court's fundamental purpose. "Funding through fines and fees puts a premium on speed at the expense of accuracy, or even fairness and justice, because fines and fees can only be assessed and collected after the case is resolved. Judges face pressure to clear cases off the docket and collect fines and fees quickly. They don't want to be 'the slow judge.'"⁶⁷

"This is a system that at the front end appoints you a lawyer because you are too poor to hire one, then at the back end ignores what it has done and puts a fine on you, knowing you cannot pay it . . . It is just a waste, and one caused because we do not fund our courts like we should."

—The Hon. CALVIN JOHNSON

Judge Johnson, who was reluctant throughout his career on the bench to assess fines and fees against indigent defendants, acknowledged that there is "certainly an appearance of impropriety" when judges are forced to take into account the financial needs of their own courtrooms in determining how to punish a defendant for his or her crime. "It's wrong. Using your own needs to determine what happens to a defendant is wrong. Or, at least, having a system where you could be influenced is wrong in itself. It's not the way a justice system should run."⁶⁸ Judge Johnson also believes the funding system offends basic notions of fairness: "It is wrong to use people who come into the system to pay for the system itself even when some people haven't done anything wrong," Judge Johnson said, explaining one of the problems with foisting the cost of justice onto those who come before the court. "You have to remember a lot of people who came before me were innocent. Not all of them, or even most of them, but many

were."⁶⁹ However, even defendants who were cleared of their charges may have nevertheless been forced to pay the \$40 fee for the appointment of their public defender.⁷⁰ Judge Johnson's criticism echoes guidance from the American Bar Association and the Conference of State Court Administrators; both organizations call for states to provide adequate budgets for their court systems that do not depend on revenue from fees and fines.⁷¹ These principles should apply even in times of fiscal crisis: "[T]he bottom line remains that the executive and legislative branches are constitutionally obligated to adequately fund the judicial branch."⁷²

The courts are not the sole beneficiaries of the fines and fees that flow into their coffers. Fees directed to the office of the public defender and to law enforcement are routinely charged alongside statutory fines and court costs, because judges are well aware that such fees are necessary to keep the system afloat.⁷³ Indigent defendants are charged fines and fees at

every step of the process; the Orleans Public Defender, for example, receives about a third of its annual \$6 million budget in fees charged to defendants who must rely on appointed counsel because they cannot afford their own lawyers; the office could not operate if such fees were not collected.⁷⁴ Chief Defender Bunton recognized that there is a value to ensuring that defendants make some investment in their representation. “But if you can’t afford a lawyer,” he acknowledged, “you can’t afford a lawyer.”⁷⁵ “This is a system that at the front end appoints you a lawyer because you are too poor to hire one, then at the back end ignores what it has done and puts a fine on you, knowing that you cannot pay it,” Judge Johnson said, noting that some 80 percent of the defendants who came before him were indigent. “How is that a sensible justice system? It is just a waste, and one caused because we do not fund our courts like we should.”⁷⁶

The Orleans Parish Criminal Sheriff is almost certainly one of the biggest beneficiaries of New Orleans’ debtors’ prisons, though the amount of money he has collected for jailing debtors is unknown. In April 2010, the ACLU of Louisiana sent a public records request to the Sheriff asking how many prisoners were being held at OPP for failing to pay LFOs.⁷⁷ His office responded that it was unable to produce the requested records.⁷⁸ Despite the Sheriff’s lack of transparency, however, publicly available information shows that the City of New Orleans paid the Sheriff \$26.7 million in 2009 for in-custody charges, plus several million dollars in other reimbursements, to incarcerate men and women charged with or convicted of municipal offenses, and those charged with state crimes.⁷⁹ Thus, even if debtors constitute only a small portion of the OPP population, the City certainly is spending significant funds each year to imprison them.

There is also no publicly available account of how much the courts collect from defendants, or how those funds are spent. In April 2007, Safe Streets/Strong Communities, a local organization that assists ex-offenders and seeks to reform the criminal justice system in Orleans Parish, filed a public records request to then-Chief Judge Raymond Bigelow, asking the Orleans Parish criminal court to reveal the extent to which the Judicial Expense Fund was funded by collections from defendants and how those funds had been used. The judge refused to reveal how the money had been spent, but did later amend the handling of the Judicial Expense Fund so that collections and expenditures were centrally administered. Judges’ attempts to reform the funding system and to increase the amount of money the courts receive from the City and state government have fallen short. Judge Johnson and others have advocated for increased transparency in the way funds are collected and distributed: “What should happen with all fines money is that it goes back to the state. Then the courts have to get in line and justify to the state what funds they need to operate. It should be all above board—the money collected and going in, and the money going back out to the courts for them to operate.”⁸⁰

“We should get away from the idea that the criminal justice system is for-profit, or that it’s going to fund itself when it is aimed at and used by the poorest people,” Chief Defender Bunton said. “There should be real incentives to have some vision—to find ways to mitigate

the effects of the system on the community.”⁸¹ For now, defendants are incarcerated every day because of their inability to pay, and the City continues to throw money away by incarcerating men and women who will never be able to pay their debts. While this self-defeating funding system remains in place, indigent defendants remain trapped in a vicious cycle of fines and imprisonment; the cycle will not stop until the courts can look elsewhere for their finances. Meaningful reform is urgently needed to ensure that no one is imprisoned for poverty, and the courts no longer feel compelled to wring their funding out of those who are among the least able to pay.

III. Recommendations

1. In accordance with the ABA’s recommendations and the standards adopted by the Conference of State Court Administrators, adequately fund the criminal courts and affiliated agencies from general revenue so that they can carry out their basic functions without relying on money collected from the payment of LFOs.⁸² Additionally, to eliminate judicial incentives to assess high fines and fees against defendants, LFO revenue should be paid into the city’s general budget, not earmarked for the courts. Treatment and diversion programs should also be funded independently of fees paid by defendants, and no one should be dropped from a diversion program because he or she is unable to pay.
2. Determine defendants’ ability to pay before any assessment of fines, fees or costs. This determination should be consistent with other determinations of indigence (such as that conducted by the office of the public defender to determine whether a defendant will receive appointed counsel) and should ensure that indigent defendants are not assessed fines, fees, or costs. Alternatives to financial accountability, such as community service requirements, should be offered consistently to all defendants who are unable to pay.
3. Collect and publish data regarding the amount of fines, fees, and costs collected from defendants, the allocation of those funds, and expenditures funded by such collections.
4. Collect and analyze data pertaining to the cost of LFO collections (including the costs of incarceration, collections agents, law enforcement costs, court administrative costs, and other costs incurred in LFO collection) in order to determine whether current collection methods are cost-effective.
5. End the practice of incarcerating individuals who are too poor to pay their legal debts. Courts should offer community service as an alternative to LFOs, but should ensure that defendants offered community service have the financial means to complete this service.

MICHIGAN

“A commitment to improve court collections will improve the credibility and integrity of the court and, at the same time, increase revenue for the recipients of these funds.”

—STATE COURT ADMINISTRATIVE OFFICE, Trial Court Collections Standards and Guidelines Manual (July 2007)

I. LFOs in Michigan

Michigan, a state hit harder than most by the recession, is trying to find operating funds in the most unlikely of places: the pockets of poor people who have been convicted of crimes. Though the Michigan Constitution forbids debtors’ prisons⁸³ and state laws explicitly prohibit the jailing of individuals who cannot pay court fines and fees because they are too poor, judges routinely threaten to jail and frequently do jail poor people who cannot pay. As in many states, the courts do not actually assess an individual’s indigence and instead use jail and the threat of jail to squeeze the poor defendant and his or her family for as much money as possible. And, though data from the state and further study are necessary, communities of color in Michigan may be disproportionately burdened by debtors’ prisons because those communities are disproportionately poor⁸⁴ and overrepresented in the state’s prisons and jails.⁸⁵

Consider the case of Kawana Young of Washtenaw County, a 25-year-old single mother of two boys, a 6-year-old and a 9-year-old. Ms. Young never had been in trouble before 2005. That year, she was ticketed because she forgot her license at home. Over the next several years, Ms. Young received several more traffic tickets for offenses like driving with loud music and an expired tag. Although many individuals could have paid these tickets and moved on with their lives, Ms. Young couldn’t afford the fines and fees. She has had a hard time finding employment in the last few years and was repeatedly laid off from work. To fulfill her LFO obligation, Ms. Young performed community service at an elderly living center. Then, the day before her LFO payments were due, her probation officer told her that her community service time would not count because the center was not nonprofit.

In March 2010, Ms. Young was driving home with her children when she was stopped by the police who told her she had three outstanding warrants for failure to pay. After making sure her children were taken care of, she cooperated with the police and accompanied them to the station. She spent the night in jail, awaiting her day in court. When she was brought before a judge the following day, the judge told her that she had to pay \$300 or serve 3 days in jail—on just

“I just need a chance to do right. It doesn’t make sense to jail people when they can’t pay because they definitely can’t pay while they’re in jail.”

—KAWANA YOUNG, who was jailed five times for failing to pay LFOs on several traffic offenses.

one of her warrants. “I have every intention of paying but I just don’t have that kind of money right now,” she told the judge. She wanted to go on a payment plan, but the judge refused. Ms. Young was sent to jail for three days because she was too poor to pay the fees. The jail also charged her a booking fee and a daily pay-to-stay fee. Ms. Young was then ordered to pay \$400 on her second warrant in May 2010 in Wayne County, also on a traffic offense. In all, she has been sent to jail five times due to nonpayment. She has recently requested an extension from the judge because she is starting a new job and needs a little more time to make her payments. She is also trying to catch up on rent and make sure her children have

food and other necessities. “I just need a chance to do right,” said Ms. Young. “It doesn’t make sense to jail people when they can’t pay because they definitely can’t pay while they’re in jail.”⁸⁶

Defendants are hit with a variety of fines and fees upon conviction. They are required to pay restitution to the victim, \$60 into a crime victims’ rights fund, and \$60 of minimum state costs per felony count.⁸⁷ The court usually then assesses additional court costs, fines, attorney fees, monthly probation or parole oversight charges, and the cost of any emergency response necessitated by the crime.⁸⁸ A 20 percent late payment fee is imposed on the entire amount not paid within 56 days of the due date.⁸⁹

Patricia Slomski, an attorney in southeastern Michigan, notes that many of the fees that land poor individuals in jail are baseless. In so-called “rocket-docket” courtrooms in Wayne County, where judges try to sentence as many defendants as quickly as possible, the assessment of lawyer fees have no relationship to—and are often much higher than—the actual cost of representation. Ms. Slomski notes that in her experience, defendants have been charged \$400 to \$500 in counsel fees when the attorney was actually paid \$75. No one cares about a defendant’s ability to pay, she says, because an indigence hearing takes time, and contested hearings are cost-prohibitive.⁹⁰

Some defendants who end up incarcerated due to unpaid LFOs are also assessed a \$12 jail entry fee, \$60 per day for jail room and board, and reimbursement to the correctional facility for medical and other services.⁹¹ Most troublingly, some jails use these fees as an excuse to unilaterally and unjustifiably extend individual sentences. Sister Marietta Fritz—who runs the Saginaw Emmaus House, which helps incarcerated women with re-entry—notes that the Saginaw County Jail tells the prisoners they have to pay the \$12 “administrative fee” to *get out* of jail. Sr. Fritz has paid that fee for at least one indigent woman out of her own pocket, deciding not to test the jail’s willingness to break the law and imprison the woman because she was indigent. Sr. Fritz has also seen women charged almost \$10,000 in “tether fees”—

parole supervision fees charged by the Michigan Department of Corrections at approximately \$95 per week for two years. Nonpayment of these fees is reported to credit bureaus, thereby decreasing the released prisoner's chance of finding a job and a place to live—positioning her not for reintegration into society, but for re-entry into the criminal justice system.⁹²

Because there is no statute that authorizes a credit against legal debt for every day that a defendant is incarcerated,⁹³ many indigent defendants who are incarcerated rack up higher and higher debts without making a dent in their LFOs. For example, in late 2009, Walter Riepen was sentenced to 30 days in jail and probation. At sentencing, the judge assessed fines and costs, but said in open court that Mr. Riepen could do community service instead of paying his legal debt because he was indigent. The probation officer, however, informed Mr. Riepen that he was not permitted to do community service to work off his \$180 in court costs and \$240 in probation supervision fees. The officer told him that if he did not pay the debt in full, he would be in violation of his probation and would go back to jail.

Before he was released from jail, Mr. Riepen was asked by officials to sign a form noting that he owed the jail money for room and board. Because he was found indigent at his trial and was appointed an attorney, he refused to sign it. Within days of his release, he received a letter from RDK Collection Services, containing a bill for \$60 per day for his jail stay, for a total of \$1260. Mr. Riepen's only income is a social security disability payment. Mr. Riepen was informed if he did not pay this bill, he would be sent back to jail.⁹⁴

Mr. Riepen began a payment plan to pay \$20 a month—\$10 for the probation costs, and \$10 for the court costs. Though these amounts are modest, Mr. Riepen has had difficulty making these payments on his fixed income while also carrying out his community service responsibilities under his sentence. In February 2010, the week he made the \$20 payment, he could not perform his community service because he did not have any money for gas. He has no funds to pay down the \$1260 for his room and board. "The Constitution is completely ignored," notes Jane Riepen, Mr. Riepen's wife. "If you're never exposed to it, you think everything's okay. That's where we were for a long time, and then one day . . ."⁹⁵

Michigan courts impose the full amount of fees and fines possible at sentencing,⁹⁶ and frequently make payment a condition of probation.⁹⁷ The entire amount must be paid at the time the fees are assessed, unless the court allows a payment plan for "good cause."⁹⁸ Most problematically, a defendant cannot even bring up his indigence at the time a judge imposes LFOs because he is not entitled to an ability-to-pay assessment until the imposition of the fee is "enforced."⁹⁹ Though the Michigan Supreme Court has stated that "a truly indigent defendant [should] never be required to pay" fees,¹⁰⁰ in practice, it is the defendant's burden both to raise the issue of indigence and to prove it. As a result, defendants without attorneys (a frequent occurrence at post-sentencing review hearings) are at a distinct disadvantage and are particularly likely to succumb to the threat of jail.

Attorneys, however, are no guarantee that indigent individuals will be heard as to their poverty. In 2003, Regina Roberts, a 49-year-old single grandmother in Kent County, was receiving food stamps and working as a resident care aide. Ms. Roberts suffers from lung disease, bipolar disorder, and depression, but was trying to make ends meet by working and taking college courses at Davenport University. When the time came to get her food stamps recertified, she asked her caseworker for help filling out the forms. The caseworker didn't correctly report her income and Ms. Roberts was charged several years later with welfare fraud. She had a court-appointed attorney at the hearing who told her not to say anything. Ms. Roberts didn't know what to do or say, and felt "out of her head and shocked," after being told that she faced 10 years in prison. She never got to share her side of the story about the caseworker or her indigence. As a result, Ms. Roberts was convicted of welfare fraud and sentenced to 2 years of probation, \$2,760 in probation supervision fees (later reduced to \$600), \$720 in costs and fees, and \$3,181 in restitution.

"This is a nightmare. I've been passed through the cracks and suffering all my life, but this just makes me sick."

— REGINA ROBERTS, who was assessed almost \$7000 in LFOs even though she was indigent and receiving disability payments.

Ms. Roberts has no income other than disability payments—she was injured on the job and then laid off—and is now waiting for a lung transplant. Still, despite having to pay significant medical expenses, she was making small but regular payments to pay down her debt. The probation officer, however, was dissatisfied with the sacrifices Ms. Roberts made, and asked the court to extend Ms. Roberts' probation for another two years. Ms. Roberts had complied for two years with all conditions of her probation, save for paying the entire amount of over \$4,500 in LFOs—but her probation was extended for another two years, thus perpetuating the threat of jail. She was finally discharged in July 2009, but still owes over \$2,865 in

restitution and fees, in addition to outstanding supervision fees. She had to return to court in September 2010 for a hearing to show cause as to why she should not be held in contempt for failure to pay. "This is a nightmare," she says. "I've been passed through the cracks and suffering all my life, but this just makes me sick."¹⁰¹

Similarly, the involvement of attorneys did not prevent Selesa Likine from being convicted for failure to pay child support that she could not afford. At the time of her trial, Ms. Likine was a divorced mother of three who was unemployed and living with her mother. Ms. Likine had paid some, but not all, of the child support she owed for the period of February 2005 to March 2008 because she suffered from severe mental illness and had almost no income during that time. She was considered totally disabled by the Social Security Administration after being diagnosed with schizoaffective disorder and major depressive disorder, and had been unemployed since September 2005 after a lengthy hospitalization. The Family Division had erroneously imputed to her an income of \$5,000 per month, resulting in required child

support payments of \$1,131 per month. In fact, Ms. Likine never earned more than \$19,000 per year, was unable to work during the period in which she fell behind in her payments, and subsisted on payments of \$603 per month from the Social Security Administration after January 2006.

After Ms. Likine was unsuccessful in getting the Family Division to modify her child support payments, the state filed felony charges against her. The Oakland County Circuit Court barred Ms. Likine from raising the issue of her inability to pay. Deprived of the chance to explain her circumstances to the jury—which had explicitly asked whether she was employed during the time she was obligated to pay the child support—Ms. Likine faces the prospect of being required to pay more than \$40,000; her court case is pending.¹⁰²

Likewise, Louis Kalman of Lenawee County spent over three years in prison when he could not afford to pay \$24,873 in child support for one of his children. Mr. Kalman was in trouble with the law from a young age and spent most of his son's childhood behind bars on other charges. Nonetheless, he worked when he could and paid as much as possible, in amounts ranging from \$4.82 to \$300. It was often less than the required amount of \$75 per week, because even at the time of trial, he was earning only \$200 per week, with a weekly rental payment of \$100. After he pled guilty to failure to pay child support, his attorney explained to the court that her client—one of the state's many "working poor"—was doing everything in his power to fulfill his obligations, and that to sentence him to prison for his efforts would be fundamentally unjust. She presented a letter from his previous employer stating that he might be employed there again upon release. Mr. Kalman's significant other shared with the court that Mr. Kalman was also at that time responsible for taking care of his elderly and ailing father. Mr. Kalman himself asked for "the opportunity to try and go back to these jobs that [he] was trying to get hammered down for full time" so that he could fulfill his responsibility to his children and his father. Moreover, the mother of Mr. Kalman's child asked the court "not to put Mr. Kalman in prison because simply as a practical matter it means she gets no money." The court ignored these arguments, however, sentencing Mr. Kalman to two to four years in prison, noting that Mr. Kalman was a "deadbeat dad" who has not "made any reasonable effort to pay." The court then specifically ordered that child support payments continue to accrue while Mr. Kalman was in prison, thus ensuring that the cycle of jail and inability to pay will continue.¹⁰³

"I do know that I have a responsibility to [my children]. I also feel that I have a responsibility to my father. I'm asking this Court to give me the opportunity to try and go back to these jobs that I was trying to get hammered down for full-time."

— LOUIS KALMAN, who was imprisoned for more than three years for failure to pay child support, even though the child's mother asked for him to be allowed to continue working.

The Fallacy of “Willful Refusal to Pay”

Before a court attempts to “enforce” any payments due, Michigan law requires it to determine an indigent defendant’s ability to pay by taking “cognizance of the individual’s resources, the other demands on his own and family’s finances, and the hardships he or his family will endure if repayment is required.”¹⁰⁴ Under United States Supreme Court law, a court may only consider revoking probation if a defendant “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.”¹⁰⁵ However, according to public defender Anne Yantus, judges sometimes “don’t believe” defendants who say they are indigent and have not been able to obtain the necessary funds¹⁰⁶

The State Court Administrative Office (SCAO) recently formalized a previously unwritten rule that all defendants must pay the minimum state costs, the crime victims’ rights assessment, and restitution, and should not be allowed to perform community service in lieu of those payments.¹⁰⁷ According to the SCAO, these assessments cannot be waived, even if the defendant is indigent and cannot pay any amount of money. No Michigan law provides such an exception to the option of community service; as detailed below, this interpretation is responsible for a great share of the heavy burden borne by indigent defendants who truly have



David Sutton (left) and his lawyer, Michael Steinberg. (Image courtesy of the ACLU of Michigan.)

MY NAME IS DAVID SUTTON and I am a long-time resident of southeastern Michigan. I have a Ph.D. from the University of Michigan but at the time I was first assessed fees and fines, I had no assets and my only income was a \$262 monthly social security disability check I received after suffering severe and permanent injuries in a car crash that prevented me from working. In 2003, I was convicted in a Wayne County court of “attempted insurance fraud” and sentenced to probation for one year. The judge knew I was indigent because I had appointed counsel. At sentencing, I reiterated that I had no funds, but he nonetheless assessed over \$1,300 in fees and costs against me. My appointed attorney—whose legal fees composed over \$800 of my outstanding debt—said nothing more than a sentence regarding this matter on my behalf.

After the judge applied my bond to the Crime Victim Rights Act assessment and the minimum state costs, I still owed more money than I could possibly pay. I asked for community service and for a hearing, but my pleas fell on deaf ears. Though my year of probation passed without incident, the judge decided to extend it. I filed a

no funds with which to pay legal debt. In order to amplify the threat of jail, courts frequently extend individuals' probation on the ground of nonpayment of these fees or costs, even though no state statutes specifically authorize courts to extend probation on this ground.¹⁰⁸

Jail, Threats of Jail, and the Devastating Effect on Families

In its zeal to collect funds, at least one Michigan court has gone so far as to jail a mother whose only crime was that she was too poor to pay for her son's incarceration at a juvenile hall. In December 2008, Edwina Nowlin's 16-year-old son was sentenced to the Bay Pines Center; Ms. Nowlin was ordered to pay \$104 per month for his incarceration. At the time of this order, Ms. Nowlin was homeless and working part-time with a friend after getting laid off from her job. She told the court that she was unable to pay the ordered amount. The judge found her in contempt for failing to pay and jailed her. While she was serving this sentence at the Delta County Jail, she was released for one day to work. She then picked up her \$178.53 paycheck from work, hopeful that she now could pay the \$104 to get out of jail. Upon her return to the jail that evening, however, the sheriff forced her to sign over her check to the jail to cover \$120

petition asking for remission of the required payment, but I never received a hearing. For the next three years—all passing without incident—I was still not allowed to perform community service to repay my debt. In 2008, I was entering the fifth year of my probation. Knowing that he could not lawfully extend my probation, the judge finally allowed me to perform 140 hours of community service in lieu of paying court costs and attorney fees. I did an additional ten hours because I knew I also owed a \$120 supervision fee. I wanted finality, to put this matter behind me. The judge refused to apply my additional service hours to the \$120 fee. He gave me 30 days to come up with the money, or else I'd spend 30 days in county jail.

I called the ACLU because I thought my experience might be representative of how other people are being treated. The judge then dismissed the case. Shockingly, he said that generally, he expects those on probation to violate their terms in some manner. I knew that the conviction was not indicative of me, that I didn't fit the profile of a career criminal, and that I wasn't going to violate probation, but I couldn't believe the judge was using the probation as a fishing net to incarcerate people. I wondered, how many others are out there? How many people had their probation extended without basis in fact and without a hearing? How many people did the judge expect to mess up?

I was naïve. I thought judges followed the rule of law. But—and it is a sad commentary on our justice system—that is not always so. When I got the ACLU involved, when I filed a complaint against the judge with the Judicial Ethics Commission, I did so because the judges and the public need to know what's happening.

for her “room and board.” She was also charged \$22 for a drug test and a booking fee. The jail refused to release her until the ACLU of Michigan got involved in an emergency hearing.¹⁰⁹

Threats of jail against a minor can be just as destructive as jail itself to a family that is struggling to put food on the table and pay rent with the help of the Family Independence Program (FIP), which provides funds to low-income families with minor children to help them pay for living expenses such as rent, heat, utilities, clothing, and food and personal care items. Attorney Jennifer Fiess, who has worked in legal aid for years and recently has substitute-taught in alternative high schools, notes that the mothers of many of the children she teaches have spent chunks of their FIP income on court costs to prevent their child from going to jail for nonpayment of fines. The children are too afraid to do anything about it, the judges are frequently unresponsive to arguments about indigence, and the overloaded attorneys who represent these children during court proceedings are unwilling to make the indigency argument that—in their minds—has no chance of success.

According to Ms. Fiess, the most terrifying impact of such threats are the evictions that occur when the families must divert money needed for rent to keep their children out of jail. Ms. Fiess tells the story of one family with a daughter in a special education program, a veteran father, and a mother sick with cancer, who lost their house and had nowhere to turn when the daughter got into trouble and had to pay fines and fees to avoid incarceration. Among the costs of their cascade into homelessness was the breakup of the family, which had to split up to arrange shelter. According to Ms. Fiess, situations like this end up shifting costs to other taxpayer-funded programs, which now have to cover court and attorney costs for the eviction proceedings, homelessness services, costs of the disruption of the child’s educational path, and increased medical costs, all as a result of a family trying to avoid jail time for their child.¹¹⁰

The Extra Burden Borne by Poor People

The proposition that “it is expensive to be poor” is frequently validated throughout Michigan. Sometimes, courts will enforce an arguably unconstitutional plea bargain that saddles an indigent defendant with a felony conviction for no other reason than he or she cannot afford to pay money owed for restitution or an outstanding child support obligation. In 2009, Stephen Heyza of Macomb County pled guilty to failure to pay child support and the sentence was delayed for two years while Mr. Heyza was placed on probation with the hope that he would pay back-owed child support. Mr. Heyza owed almost \$140,000 in back support, plus about \$3,000 in costs and fees. The prosecutor told him that if he paid 50% of the amount due, the charge would be reduced to a two-year felony; if he paid 80%, the charge would be reduced to a 93 day misdemeanor; and if he paid all of it, the case would be dismissed. On the day of the hearing, but before Mr. Heyza made the decision to enter the guilty plea, the judge prohibited him from introducing evidence at his trial of his inability to pay, leaving Mr. Heyza with no choice but to take the plea. Mr. Heyza could only say: “I paid when I was able to pay, Judge. I’m disabled.”

He has been unable to work during the past eight years because of a host of physical and psychological problems. He was receiving food stamps and recently was homeless until he was taken into the home of a friend.

The judge noted that “his hope of complying with any of those conditions [of the delay of sentence] is like slim, none and zero.” Nevertheless, he sentenced Mr. Heyza and threatened that if he did not comply with the conditions, notice of the conviction would be forwarded to the secretary of state and three years of additional probation would be ordered. Mr. Heyza later attempted unsuccessfully to withdraw his plea on the ground that he was misinformed as to the nature of the crime and the amount owed. Whereas a person of means could have walked away without the threat of jail time, and a person of moderate means would have experienced minimal impact on his or her life, Mr. Heyza is still facing the constant threat of incarceration as a result of being on probation.¹¹¹

Lack of Consistency Among Courts

James Maceroni represents indigent defendants in Macomb County as an appointed attorney. He notes that because there are no criteria for how courts come up with cost assessments, they vary significantly between jurisdictions. For example, the assessments in Warren Township are relatively low because judges there are generally more sensitive to the financial situations of indigent criminal defendants. In Clinton Township, by contrast, the assessments are very high. Mr. Maceroni also notes that courts in Clinton Township hit indigent defendants with the same high fines, fees, and costs as defendants who are able to pay. Defendants who plead guilty are told at the plea hearing to bring the full amount of court-ordered payments to sentencing. The courts do not inquire into and do not listen to accounts of individual defendants’ economic hardships. Defendants end up paying whatever little money they are able to obtain or borrow, whereupon the court threatens them with incarceration and orders them to come back on the next hearing date with the rest of the amount due; this cycle may continue for years.¹¹²

Courts across the state are just as arbitrary in their handling of probation revocations based on a defendant’s inability to pay fees. Public defender Anne Yantus has had cases across the state in which the judge, at times, did not believe that the defendant could not pay the assessed debt. The problem stems in part from the fact that there are no set guidelines to help a court assess an individual’s ability to pay. The system is also plagued by a lack of communication between court personnel and probation officials. At times, this has resulted in defendants having their probation revoked and being remanded to jail for failing to pay fines they did not even know they were obligated to pay. Ms. Yantus handled one case in which a high school student was ordered to pay court costs by getting a job. The judge told the defendant that he did not have to work as long as he was a full-time student, but did not place that qualification in the record. The student did not look for work and therefore did not pay the costs. He was found in violation of his probation for this and other reasons and sentenced to jail.¹¹³

II. Special Focus: Michigan's Recent Shift Toward Aggressive Collections

There are two different trial-level courts in Michigan: district courts and circuit courts. District courts generally handle low-level offenses, while circuit courts are trial courts of general jurisdiction and also handle appeals from district courts. District courts are allowed to retain a greater proportion of the total LFO assessment than circuit courts. According to public defenders and court-appointed counsel, such as James Maceroni, this structure gives district courts an “incentive to jack up the fees as much as possible” in order to fund their local budget. Mr. Maceroni notes that, in his practice, if he has the option to waive a charge from the district court up to the circuit court while ensuring that a defendant will be offered the same plea agreement, he will take that opportunity because costs and fees assessed in circuit courts are significantly lower than those in district courts.¹¹⁴

According to Anne Yantus, some courts in more rural areas of the state have adopted particularly aggressive collection practices because costs and fees can be such a big part of the local budget. To illustrate, payments of fines go to a statewide library fund; thus, many courts do not impose relatively high fines because they do not get to keep the money. Court costs and attorneys' fees, however, are set by the individual circuit courts themselves and are retained by the circuit court. As a result, many courts, including those in rural counties, have increased their assessments of court costs in order to bring in more revenue. Ms. Yantus says that some courts in less populated areas send out form letters to indigent defendants who have court-appointed counsel directing them to pay attorneys' fees before the completion of the case. These letters do not inform the defendants that they are entitled to a hearing on their ability to pay.¹¹⁵

In May 2004, then-Chief Justice Maura D. Corrigan of the Michigan Supreme Court authorized the State Court Administrative Office (SCAO) to create a Court Collections Advisory Committee to develop recommendations for ways to improve the collection of court-ordered financial sanctions. The Committee issued its final report in July 2009. The Committee recommended, among other things, that the Supreme Court support legislation that allows courts to assess an additional fee if the defendant does not pay in full on the day the court imposes financial obligations. This fee, which is separate from the current 20 percent late payment fee imposed on those who do not pay within 56 days, was justified by the Committee as a means to help defray the costs of collecting and managing payments assessed and received by the courts.¹¹⁶

As a result of the Committee's work, in February 2010, the Michigan Supreme Court adopted an Administrative Order mandating that each local court abide by SCAO collection program requirements and submit receivables and collection reports annually.¹¹⁷ The ten collection program requirements are all aimed at increasing the flow of revenue into the court system, even at the expense of basic due process protections for criminal defendants. They include directives that payment alternatives should not be allowed for restitution, the Crime Victims

Rights Assessment, or minimum state costs; that requests for additional time to pay should be decided not by a judge on the record in open court, but by a court official; and that courts should consistently and promptly impose sanctions for late payments and utilize show cause hearings and bench warrants—tools associated with debtors’ prisons—to ensure compliance.¹¹⁸

This is not the first time the SCAO has advised Michigan judges to speed up debt collections without due regard for the law. In 2007, the SCAO issued its Trial Court Collections Standards and Guidelines Manual for judges and court staff. The manual explicitly allows incarceration as a sanction for failure to pay, with no discussion of the constitutional prohibition on incarceration of individuals when nonpayment is due to indigence. The manual also recommends a finding of violation of probation for failure to pay, again with no mention of the statutory prohibition on probation revocation for failure to pay due to indigence.¹¹⁹

Though they have promulgated general guidelines, the SCAO and the Advisory Committee did not endorse any specific collection program, but instead recommended that each court create its own based on its individualized needs. To this end, the SCAO also has developed a website with fairly extensive listings of “best practices” in legal debt collections. Some of the practices offered are comparatively benign, such as prison account sweeps and the use of a software program to notify defendants of nonpayment. However, other “best practices” publicized by the SCAO are clearly unconstitutional. For example, the Isabella County Trial Court collection policy states: “If there is an inability to pay the amounts in full at the time of sentencing and indigence has been determined, then there shall be a recommendation of community service work or jail time in lieu of monetary payment”—a flatly unconstitutional proposition.¹²⁰

The SCAO also publicized as a best practice a letter from the court administrator to the employees of the 10th District Court in Calhoun County pushing “a culture shift” toward more aggressive collection practices:

During these tough economic times it’s imperative that the public trusts the court to do its part in making sure fines and costs are paid. . . .

The letter also contains a wholly separate reason for the “culture shift”: Out of the \$210,973 January 2009 general fund revenues for the court, money taken in from legal debt collections was \$126,600—almost 60 percent of the court’s total revenue.¹²¹

Similarly, the SCAO publicized as a best practice the numerous detailed policies of the 37th Judicial Circuit Court regarding collections.¹²² One of those policies notes that a defendant whose gross income barely exceeds the Federal Poverty Guidelines must pay a minimum of \$885 in addition to restitution and probation fees.¹²³ Of this amount, at least 20 percent must be paid at initial sentencing. That means that a defendant whose income is \$241 a week or less must come to court for sentencing with \$177, or 73 percent of his weekly income.

Finally, the SCAO advertised as a best practice the program run by the 67th District Court in Genesee County. That court instituted a month-long program allowing individuals with warrants to come to court and work out payment plans. After the month-long period, “law enforcement officers began picking people up at home and work. The warrant sweep began at 3 p.m. and courtrooms were kept open late (one until 9 p.m. and another until 4:30 a.m. the next morning). By 9 p.m., one judge had arraigned 30 people on 42 misdemeanors and felonies and collected \$6,000. Then, a lock-up area was kept open at the downtown courtroom so officers could continue to arrest people overnight. The county board approved overtime for the night court, which was intended to show that the courts were serious. An additional 16 people were arraigned on 23 warrants the next morning. By 4:30 a.m., another judge had arraigned 42 people on 61 warrants, collected \$7,000, and set bonds totaling \$370,000. In one of the communities, many residents came to observe the night court proceedings.”¹²⁴ Unconstitutional incarceration thus became not only a way to increase local revenue but also a form of civic entertainment.

Lack of Transparency

To evaluate the effectiveness of the incarceration of indigent defendants as a collection tool, the ACLU requested data on collections from numerous state entities. The ACLU sent a state Freedom of Information Act request to the Michigan Department of Corrections requesting data on imposition and collection of fees from defendants and incarceration of those who could not pay. The MDOC responded that they had no relevant documents.¹²⁵

The ACLU also sent a public records request to the SCAO for all collection plans, annual payment/adjustment information, and outstanding receivables reports that it collects from state courts. The SCAO refused to produce these documents, maintaining that individual court and county-level collection plans and the relevant payment/adjustment figures are not public information.¹²⁶ The SCAO released regional statistics of imposition and collection data, which reflect disturbing trends of increasing imposed amounts and decreasing collection rates.¹²⁷ However, at the time of this writing, the SCAO has not released any data that shows how much these increasingly futile efforts are costing taxpayers.

This lack of transparency erodes the public’s confidence in the collections programs the state courts have implemented. Michigan taxpayers are entitled to know whether these collections schemes are actually contributing to the county coffers or siphoning funds away. Signs point to the latter, as the average cost of housing an inmate in Michigan is almost \$90 per day.¹²⁸ When one adds the cost of executing a warrant and booking the inmate in jail, it becomes clear that, for example, it cost the state more to incarcerate Kawana Young for three days than she actually owed the state. However, the only way the state can answer whether their counties’ collections efforts are cost-effective is to conduct a cost-benefit analysis that is based on the

individual county and court collection data that the SCAO refuses to disclose. Indeed, the very Administrative Order that requires state court reporting to SCAO notes that effective collection of financial sanctions from individuals “enhances the courts’ integrity and credibility”—which is undermined if the public is not actually given access to the data.

III. Recommendations

1. Judges and court officials must use constitutionally and statutorily permissible methods of LFO collection. State Court Administrative Office materials should be updated to reflect such methods.
2. The State Court Administrative Office should publicize collection methods and practices, the costs of collection, such as execution of warrants and incarceration, and the actual amounts collected and adjusted, for every district and circuit, so that the public may assess the effectiveness and legality of all collection systems.
3. Judges should allow defendants to perform community service for all types of LFOs, including minimum state costs, the crime victims’ rights assessment, restitution, and probation supervision costs.
4. A judicial assessment of a convicted defendant’s ability to pay LFOs must be comprehensive. At a minimum, it should include but not be limited to consideration of the defendant’s present employment, earning capacity and living expenses, dependents, outstanding debts and liabilities, public assistance, and other similar matters. LFOs should not be imposed on a defendant if the payment of the LFOs will subject the defendant or the defendant’s dependents to substantial financial hardship.
5. Judges should assess fines separately from costs, legal counsel fees, restitution, and other non-punitive LFOs. This will allow for proper tracking and will account for the possible differences in consequences of nonpayment.

OHIO

“The choice of paying a fine or spending days in jail is really no choice at all to a person who cannot raise the fine.”

—*STRATTMAN V. STUDT*, 253 N.E.2d 749, 753 (Ohio 1969)

I. LFOs in Ohio

“It’s Charles Dickens over here, real debtors’ prisons,” says Tim Young, the State Public Defender. Although the Ohio Constitution explicitly prohibits debtors’ prisons,¹²⁹ and state statutes and case law forbid the incarceration of indigent individuals for failure to pay any kind of court debt, this tragic reality occurs every day in mayors’ courts¹³⁰ and municipal courts¹³¹—the courts that handle all low-level offenses in the state. Ohio judges and lawyers are often unaware of, or simply do not follow, the relevant law. As a result, countless Ohioans languish in prisons and jails, facing a growing mountain of debt.

Ohio has some of the strongest statutory language and case law in the country prohibiting the jailing of individuals because they are too poor to pay fines and fees to courts. A defendant may only be jailed for *willful* nonpayment of a fine, based on a judge’s determination—at a mandatory, on-the-record hearing where the defendant is represented by counsel—that the defendant is able to pay the full amount of the fine but refuses to do so.¹³² The defendant may then be incarcerated with a credit toward his fine of \$50 for each day he remains in jail.¹³³

Defendants may never be sent to jail for failure to pay court costs, restitution, and other related fees.¹³⁴ Unlike fines, which are punitive under Ohio law, these LFOs are purely civil judgments in favor of the prosecuting entity or the victim¹³⁵ that may be collected only through civil means, such as bankruptcy proceedings.¹³⁶

According to Mr. Young, courts ignore these laws in three primary ways: (1) holding defendants in contempt for failing to pay, without due process, counsel, or notice; (2) ordering defendants to “pay or appear” and then incarcerating individuals for the “failure to appear;” and (3) jailing defendants who are too poor to pay court costs or restitution, which are clearly civil judgments. All of “these practices are completely illegal,” notes Mr. Young. The civil nature of cost and fees means that no technical tricks, such as contempt¹³⁷ or failure to appear,¹³⁸ may be used by the courts to jail poor defendants for nonpayment. However, “every time we’ve challenged them, the judge thinks they’re okay,” says Mr. Young. “It is a horribly widespread belief among judges as well as defense lawyers, and we’re trying to change it, but it’s like moving a glacier.”¹³⁹

Debtors' prisons may also have a racially disparate impact, as people of color are disproportionately involved with the criminal justice system in Ohio¹⁴⁰ and are disproportionately poor.¹⁴¹ Because Ohio does not make public the racial breakdown of LFO imposition and collection, however, it is impossible to assess exactly how much of the burden of these illegal practices is borne by minority communities.

Ohio law prohibits revoking an individual's probation for failure to pay costs.¹⁴² As the Ohio Supreme Court stated in a unanimous decision more than four decades ago, because an "indigent person taxed with costs in a civil action is not jailed to work off this obligation . . . there is no justification for imprisonment for nonpayment of costs in criminal cases."¹⁴³ "[S]tatutory provisions for payment of court costs," the Court said, "were not enacted to serve a punitive, retributive, or rehabilitative purpose."¹⁴⁴

A defendant may not even be jailed for failing to perform court-ordered community service.¹⁴⁵ Quoting the United States Supreme Court, the Ohio Court of Appeals explicitly reaffirmed that the Thirteenth Amendment "does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other."¹⁴⁶

Judges Abuse Their Contempt Powers

Ohio courts ignore the clear statutes and case law and use their powers of contempt and probation revocation to keep individuals unable to pay their LFOs ensnared in the criminal justice system. For example, in 2006, Howard Webb was arrested and charged with contempt of court "for repeatedly violating previous agreements to pay fines and court costs in nine criminal and traffic cases in the Xenia Municipal Court." At the time, Mr. Webb was employed as a dishwasher earning \$7 per hour. He was making child support payments of \$118.23 every two weeks, and had previously been on disability. He owed \$2,882.36 in fines and costs—assessed as a combined amount—that had accumulated and grown over the decade, as Judge Susan L. Goldie repeatedly issued warrants for his arrest. In addition to days spent in jail awaiting a hearing, Mr. Webb served 114 days in jail in 2000, when Judge Goldie revoked his probation and refused to grant him credit since he "was given a chance to avoid this jail and didn't care enough."¹⁴⁷

He then served 30 days for contempt in 2002, and 60 more days as a result of a revoked probation in 2005, all for failure to pay the assessed fines and costs. During these years, Mr. Webb entered into several payment plans, made some payments, signed up for community service, and also wrote numerous letters to the Court asking for early release so that he could keep his employment and make payments. The Court denied all his requests, noting that it would only release him "if the court receives all the [money] he owes."¹⁴⁸ Mr. Webb never received credit

against his fines due in the amount of \$50 per day, as required by statute. In all, Mr. Webb should have been credited \$10,200 for the 204 days in jail he had served through 2005, more than three times the amount of LFOs he owed.

Nevertheless, on August 1, 2006, Judge Goldie sentenced Mr. Webb to 30 days in jail served consecutively for each “contempt” violation, resulting in a total sentence of 270 days of jail time—enough to cover \$13,500 in fines, had he been given appropriate credit. Mr. Webb tried to explain that most of his small income was going to child support and supporting his fiancée. “I’m going to pay” the debt, he said. “No, you are not,” retorted the Court.¹⁴⁹ Mr. Webb ended up serving 126 days, and was released by order of the Greene County Court of Appeals; soon thereafter, his case and all associated LFOs were dismissed.¹⁵⁰

Howard Webb spent a total of 330 days in jail for failure to pay \$2,882 in fines and costs, enough to cover \$16,500 in LFOs had he been given appropriate credit as required by law.

In September 2008, after Judge Goldie conceded that she “knowingly failed to follow the law,” the Ohio Supreme Court Disciplinary Counsel publicly reprimanded her for imposing jail sentences “in flagrant disregard for the law,” and specifically cited the Webb case as an example.¹⁵¹

State Public Defender Tim Young states that it is commonplace for judges to fail to give defendants credit of \$50 per day against their court debt when they are jailed for contempt, as courts are required to do. The individuals are then stuck in a spiral of court debt: if they cannot pay an initial \$50 fine, they are arrested and warrant costs are assessed against them. Suddenly, they are hundreds of dollars in debt, even though a day of incarceration—albeit unlawful because the defendant’s refusal to pay was not willful—should have cleared the initial fine.

Like Mr. Webb, Yolanda Twitty was incarcerated for her legal debts in violation of Ohio law. In 2005, Ms. Twitty was found guilty of unauthorized use of property—a fourth degree misdemeanor carrying a maximum punishment of 30 days in jail. The judge gave her credit for 10 days served, suspended 20 days of her sentence, and assessed \$200 in fines (\$100 suspended) plus court costs—for a total of \$251 in LFOs. Ms. Twitty could not pay. She was arrested four different times and ended up serving 33 days in jail—three days more than the maximum jail sentence she could have received for her underlying offense. The judge did not give her credit for the time she spent in jail and continued insisting that she owed 20 more days. The Common Pleas Court finally ordered Ms. Twitty’s release after the repeated involvement of the public defender. The Montgomery County Court then set the case for a status hearing, presumably on Ms. Twitty’s failure to pay. Ms. Twitty failed to appear, and was

“I didn’t know anyone else who got jailed like this. I didn’t know where to turn.”

— AARON HERRON, an 18-year-old student who was jailed for approximately ten days because he could not afford to pay \$370 in LFOs.

arrested and jailed for two more days, even though there was no evidence that she had ever received notice of the hearing. Ms. Twitty was released after the local appellate court again intervened and ordered her release.¹⁵²

Both Mr. Webb’s and Ms. Twitty’s cases aptly show that Ohio’s “debtors’ prisons” do not make any financial sense. The cost of incarceration in Ohio jails is approximately \$70 per day,¹⁵³ depending on the jail, and the execution of a warrant costs about \$400.¹⁵⁴ The first day of incarceration is the most expensive because of processing costs. The cost to Ohio prisons to process inmates, for example, is approximately \$300 for men and \$800 for women.¹⁵⁵ That means that imprisoning Ms. Twitty for 35 days cost the

taxpayers at least \$2,450 plus execution of warrants and multiple processing costs—more than ten times the original amount of her debt. Mr. Webb’s 330-day incarceration came at a public cost of close to \$23,100, more than eight times his unpaid LFOs.

Juveniles are Sent to Jail for Unpaid Legal Debts

Attorney Kay Locke of the Montgomery County Public Defender’s Office reports that “debtors’ prisons” extend to the Juvenile Court. Apparently, the court’s probation officers have been told to file “violation of court order” petitions against children for nonpayment of court fines and fees. The children are then brought to court without counsel, threatened with jail, and given 30 days to pay. If the children cannot pay, they are jailed, and the Public Defender’s Office would never even hear about their incarceration.¹⁵⁶

This scenario happened recently to a young man in Dayton, Ohio. Aaron Herron, an 18-year-old boy attending Meadowdale High School, received several tickets for minor offenses, and was assessed approximately \$370 in fines and fees. He told his probation officer that he could not afford to pay the entire amount immediately because he was not working and was living with his grandmother, who herself was living paycheck to paycheck. Nonetheless, Aaron ended up back in Juvenile Court. Court officials first insisted that he owed the money dating back to 1991—until Aaron pointed out that he was born that year. He also put down a \$20 payment, which was all he could afford at that point. In response, the court gave Aaron about a month to pay the rest. At the next hearing—though Aaron had no attorney and no relative present because his grandmother was at work that day—the court sentenced him to 30 days in the adult county jail.

Ms. Locke found out about Aaron accidentally. Aaron’s grandmother happened to tell Ms. Locke’s colleague, Patricia Rousseau, about Aaron’s arrest, but, unaware of their rights in the absence of an appointed attorney, his grandmother did not plan to fight Aaron’s incarceration because she thought that was just the way it was. “I didn’t know anyone else who got jailed like this,” said Aaron. “I didn’t know where to turn.”

Ms. Locke contacted the magistrate to request that Aaron be immediately discharged, faxing the magistrate the relevant case law showing that Aaron’s sentence was illegal. The magistrate responded that the sentence was legal, first suggesting that the cases did not apply to juveniles and then stating that the imprisonment was not for “nonpayment” but for “delinquency due to nonpayment”—an argument clearly inconsistent with established Ohio law. The magistrate was not persuaded that Aaron should be released even though he had earned enough credit under the state’s \$50 per day credit statute to cover his unpaid debts. Aaron was only freed—after approximately ten days in jail—after the prosecutor agreed to the release. “It just doesn’t make sense,” says Aaron. “If I’m locked up, how are they going to get the money?”¹⁵⁷

“The court has no intention of putting you in jail unless of course you can’t pay your fines and costs.”

— JUDGE JEFF PAYTON of the Mansfield Municipal Court to Gerald Merriweather, who was jailed for 30 days for nonpayment of \$236 in LFOs.

Municipal and Mayor’s Courts Disregard State Law

Mr. Webb, Ms. Twitty, and Mr. Herron were all eventually released through the work of their attorneys, which illustrates the critical role attorneys play in ensuring that judges follow state law in their efforts to collect LFOs. That is why Ohio law guarantees that indigent defendants who face incarceration for unpaid legal debts are provided with a lawyer. This essential protection is, however, often denied to indigent defendants appearing in the state’s municipal and mayor’s courts. For example, in September 2009, Gerald Merriweather, an unemployed 52-year-old man receiving public assistance, served 28 days in jail because he could not afford to pay \$236 in fines and costs. He appeared before Judge Jeff Payton in Mansfield Municipal Court in Richland County on charges of possession of drug paraphernalia and violation of open container laws. Without an attorney, Mr. Merriweather pled guilty to the first charge in exchange for dismissal of the second. Judge Payton first told him he would have to pay \$236 in fines and costs on the current charge and then started going through Mr. Merriweather’s payment records: “We have you owing quite a bit” on previous charges, he stated. Mr. Merriweather was confused, noting that he did his jail time. “You could do the jail time and still owe the fines,” responded Judge Payton. “[S]ometimes they [go away]. Most of the time they do not.” Judge Payton ignored the fact that the previous charges had already been sent to collections.

When Mr. Merriweather told the judge he could not pay the \$236 on the current charge, Judge Payton threatened to impose immediately the entire 30-day jail sentence (with credit for 2 days served). “The court has no intention of putting you in jail unless of course you can’t pay your fines and costs,” clarified Judge Payton. Even if he did pay the \$236, however, the court told him it would still schedule jail time a month later for nonpayment of his previous fines and costs.

Mr. Merriweather tried to ask his sister to borrow the money but could not reach her. He reported to jail the following day. Because he was too poor to pay or borrow the \$236 he owed in fines and costs, he served 28 days behind bars. The court did not grant Mr. Merriweather credit against his fines—as required by law—and Mr. Merriweather remains a debtor.¹⁵⁸

The fact that many defendants in these courts are unrepresented by counsel is also hampering reform efforts because no attorney is available to prevent the judge from violating the individual’s constitutional and statutory rights. Unrepresented defendants generally do not file appeals, since they do not know the law, and do not know their rights were violated. In addition, while appeals courts usually recognize the violation and release wrongfully jailed defendants, they typically do not do so in published opinions or orders which would instruct mayor’s and municipal court judges on the law prohibiting debtors’ prisons. Also, jails sometimes release wrongfully jailed defendants after a phone call from the public defender. Thus, mayor’s courts and municipal courts continue wrongly to incarcerate poor defendants, with few or no checks on their violations of the law.

One local attorney notes that Judge James DeWeese of the Richland County Common Pleas Court routinely requires individuals sentenced to misdemeanors to pay the maximum fine on the date of sentencing or else he will send them to jail for the maximum term allowed. The attorney shares that two recent clients were threatened with jail and were forced to beg and borrow money from family members to avoid incarceration. One of the clients is in his late 50s, suffers from a host of medical problems, and has no prior criminal record. He got in trouble when a cosigner on his business claimed that he stole her identity. The judge threatened him with jail, refused to listen when he testified about his financial situation, and refused to even consider the possibility of putting him on a payment plan. The defendant left the courtroom in tears and barely scraped together the funds by borrowing from his elderly father. Judge DeWeese also adds court costs and appointed attorney’s fees to cases as a condition of probation without a hearing and without regard to circumstances, and then frequently finds defendants in violation of probation for failure to pay. Moreover, it appears that appeals and petitions for writs of habeas corpus are not always effective because Judge DeWeese sometimes goes out of his way to ensure that his sentences are shielded from review by the appellate court: once, he even offered a defendant a “judicial release” if she would dismiss her appeal of his illegal sentence.¹⁵⁹

One Attorney's Long Fight to End Dayton's Debtors' Prisons

A veritable crusader on the matter of debtors' prisons, former Montgomery County Public Defender Glen H. Dewar has tirelessly worked for years to end Ohio's debtors' prisons. In December 2001, he hand-delivered to every judge and magistrate on the Dayton Municipal Court a detailed letter explaining the unlawfulness of the court's practice of combining fines and costs and its written policy of issuing arrest warrants and license blocks against individuals who fail to pay the full amount. He detailed the court's unlawful practices of jailing indigent debtors for "contempt" or "failure to appear" and failing to credit fines for time served when the individuals were jailed. He also requested that the court purge its list of unlawful arrest warrants for failure to pay costs.¹⁶⁰

Though the court changed its written policy in response to the letters, its practices and the unlawful warrant list remained. During the following year, Mr. Dewar worked with a statistics professor from Wright State University analyzing 5,434 outstanding post-disposition arrest warrants from the Dayton Municipal Court. The analysis concluded that less than 7% of the warrants were valid. In 2002, Mr. Dewar demonstrated to the court in another detailed letter exactly how to purge its list of unlawful warrants.¹⁶¹ Because of the ingrained belief that these debtors' prisons were constitutional, the Dayton courts refused to clear any outstanding warrants for failure to pay, even after the public defender's office hinted at a possible class action lawsuit.

Between 2002 and 2005, appeals courts across Ohio issued multiple decisions¹⁶² clarifying that defendants may not be imprisoned for failure to pay fines or costs due to indigence and that there exists a single statutory mechanism to imprison defendants for willful failure to pay fines. In 2005, Mr. Dewar obtained an electronic copy of the Dayton Municipal Court's warrant list—about 5,900 names—and again worked with a statistics professor to identify warrants that were unlawful because the person had served enough days at \$50 per day to satisfy the fine, or because the outstanding balances were only from civil costs or restitution. More than 65% of the warrants were unlawful. Public Defender Tim Young again took this information to Dayton's court administrator. Only in September 2005 did the court agree to delete all unlawful arrest warrants for nonpayment, and to use collection agencies to recover debt. Mr. Dewar then wrote a letter to all the other judges and magistrates in Montgomery county asking them to follow Dayton's lead, but received no response. Some other courts did eventually follow suit.¹⁶³

Unsurprisingly, the collection agency has already collected more money for the Dayton Municipal Court than the city obtained from its previous incarceration efforts.¹⁶⁴ It costs approximately \$400 to issue a warrant against an individual, arrest him, jail him, and bring him before a court for nonpayment.¹⁶⁵ Not only is incarceration for nonpayment unlawful, it also makes absolutely no fiscal sense.



Glen H. Dewar. (Image courtesy of Glen H. Dewar and Easterling Studios.)

GLEN H. DEWAR former Montgomery County Public Defender:

My estimate is that 20 to 25 percent of all local incarcerations statewide are for fines and costs, while about 50 percent of arrests are for fines and costs.

Before 2005, in Montgomery County it was common for 200–300 persons to be arrested for fines and/or costs every week. Conservatively, about 25 percent of the daily corrections population was due to incarcerations for fines and/or costs. None of the persons arrested for nonpayment of fines and costs appeared on any court docket. Nor were they ever scheduled to appear at any particular time before any particular judge or magistrate.

This is why the scope of the problem, in terms of both numbers of arrests and days in jail, remained hidden until, in 2000, the County Jail records were

computerized. I suddenly had access to the “jail screen” that gave me information about every person locked up after January 1st of that year. I began receiving daily lock-up lists for every court, where I could see persons locked up for “fines/costs” or “ff/cc” or “contempt” with an odd bail amount equal to the amount of the fines and costs that were owed, like “\$254.00.” or “\$309.00,” etc. The amount could be in the thousands of dollars.

The county also expanded jail space at a cost of millions, unaware of the fact that it was not for criminals but for debtors. Attorneys in my office outwardly opposed my position, suggesting that persons who cannot pay their fines and costs should stay in jail until they pay or actually espousing the illogic that the defendants were not getting locked up for failure to pay but for contempt. I could not find one judge, or more than one in ten lawyers in

Defendants Are Misled About Their Rights

Counties depend on the revenue stream from assessments of fines and fees against criminal defendants to rescue their failing budgets. This may explain why defendants are frequently misled about their rights, including their right to have a hearing on their ability to pay before they are incarcerated for nonpayment of a fine. For example, the Eaton Municipal Court Violation Bureau Fine Schedule states that “Failure to appear or pay the fine will subject you to arrest and/or cancellation of your operator’s license,”¹⁶⁷ and completely omits any discussion of inability to pay.

The Hamilton County Municipal Court statement providing instructions on fines is misleading regarding a defendant’s right to a hearing and flatly incorrect regarding the \$50 per day of credit an incarcerated defendant is entitled to receive against his fine: “If the amount due is not paid and the defendant does not appear in court on the stay date, the judge can be expected to issue a *capias* requiring the arrest and incarceration of the defendant until the fine is paid or ‘served’ in jail at the rate of \$30 per day.”¹⁶⁸

the community to agree with me. The magnitude of the number of persons locked up each day, combined with the multiple times each person had been locked up over years, combined with the number of days each person had spent in jail for each arrest, shocked me. My job became a mission and my mission became an obsession to end the debtors' prison system in Montgomery County. It was not easy getting a case out of Dayton Municipal Court to the court of appeals. Whenever I would challenge a case in the Court, the judge or magistrate would simply terminate the case before I could perfect an appeal. Meanwhile, the system rolled along unhindered in other Dayton courtrooms outside my presence, because the cases never appeared on a docket and were never consistently or predictably scheduled.

When we approached the Dayton Municipal Court in 2005 with the results of the warrant list study, they purged the list, and the number of arrests for fines and costs significantly decreased in Montgomery County, though they still continued to a lesser extent into the latter part of the decade. Moreover, it became somewhat easier to remedy the unconstitutional imprisonment after the fact: when I would recently see someone held for fines and costs in this county, I could call the court and get the person released. Nevertheless, I could readily find debtors locked up in other counties. As recently as 2008, I wrote in a brief: "Courts regularly, without exception in Counsel's experience, incarcerate persons for nonpayment of court costs as often as they incarcerate for nonpayment of fines. Courts do this by combining the amount of the fine with the amount of the court costs, and then jailing an offender that fails to pay the full sum. The Second District Court of Appeals has counseled against this practice. . . . Every, every, every court has ignored the Court of Appeals in this regard."

I believe that in this system, state courts have responsibility to enforce state law.¹⁶⁶

Renowned Cincinnati civil rights attorney Bob Newman notes that, at least in Hamilton County, he is not aware of any individuals who are serving time for nonpayment of fines. This is not because courts strictly follow the constitution and statutes barring the jailing of indigent defendants—it's because the jails are already overcrowded. Courts simply have no room to incarcerate nonviolent offenders.

Still, the threat of jail is used as a collection technique, and it is quite effective. If fines and costs are assessed, and defendants tell the judge that they have no money to pay, the court will threaten them with incarceration to get them to pay up. Once the court is done "squeezing the indigent people for as much money as possible," Mr. Newman says, the defendant is told to go into the hallway and make calls to relatives for the next two hours. "It's a very expensive proposition to be poor here," says Mr. Newman.¹⁶⁹

This is precisely what happened to "Ty"¹⁷⁰ who pled guilty to failure to pay \$274 in city taxes in November 2009. He was sentenced to thirty days of jail with the entire term suspended on the condition that he pay the taxes, a \$75 fine, and \$107 in court costs. He was ordered to appear in court for a "fines and costs" hearing, but was unable to appear because he had just obtained

employment and could not get the day off from work. That hearing was rescheduled, and when Ty appeared on the second day, he was advised that he was being charged with contempt of court for failure to pay fines and costs. He was not given a chance to explain, nor offered community service or a payment plan. Instead, the court added \$25 for the contempt action and \$25 for appointment of a public defender. The public defender argued that contempt for nonpayment of fines when the defendant is indigent is unlawful under Ohio law, but the court ignored that argument. Under threat of jail, Ty borrowed money to pay the court and avoid incarceration.¹⁷¹

II. Special Focus: Ohio's Municipal & Mayor's Courts and "Pay-to-Stay" Programs

Mayor's Courts and Municipal Courts

One controversial moneymaker for local governments in Ohio is the mayor's courts—smaller courts that are largely unregulated and thus freely impose astronomical fines on indigent defendants. Ohio law allows mayors of municipalities that are populated by more than 100 people and have no municipal court to conduct "mayor's court" for violations of local ordinances and traffic misdemeanors. Over 84% of cases in mayor's courts are traffic tickets, and the defendant is found guilty about 86% of the time.¹⁷²

According to David Singleton of the Ohio Justice & Policy Institute, individuals appearing before the mayor's courts generally are unrepresented by counsel. Routinely, they fork over fees and fines without hearings on their ability to pay. And often, when they are unable to pay down their debts, the court issues warrants for their arrest. These courts can generate significant income for the municipal corporations that operate them.¹⁷³ For example, prior to 2003, the Village of New Rome, population 60, received an average of \$400,000 a year in fines and costs.¹⁷⁴

Many, however, have criticized the courts for their lack of regulation and the incentives they have to pad local budgets. The late Ohio Supreme Court Chief Justice Thomas J. Moyer called for their elimination, noting that "[t]he Sixth Circuit Court of Appeals recognized the inherent conflict in a system that permits the person responsible for the fiscal well being of a community to use judicial powers to produce income that supports th[at] well being."¹⁷⁵

Municipal courts are part of the regular state judicial system, and are therefore better regulated.¹⁷⁶ Nevertheless, defendants in municipal courts are racking up debt as well. The Ohio Supreme Court recently held that municipal courts have statutory authority to impose "special project" fees on defendants in addition to court costs. These include costs for anything

from “acquisition of additional facilities or the rehabilitation of existing facilities” to “the hiring and training of staff,” and can be imposed on defendants not once per case, but upon the “filing of each criminal cause.”¹⁷⁷ Thus, municipal courts now have the authority to charge their operating costs to defendants multiple times in a single sentencing. Many times, they “won’t let you leave ‘til you pay,” says Robert Tobik, the Cleveland Public Defender.¹⁷⁸

Pay to Stay Programs

Ohio’s so-called “pay-to-stay” programs—charging inmates for their time spent in jail or prison—have been the subject of much controversy. An Ohio statute allows correctional facilities to charge inmates a booking fee upon initial processing, and costs of room and board, medical and dental treatments, and random drug tests.¹⁷⁹ An important limitation is that the law now allows jails and prisons to charge only those prisoners who have been convicted of crimes.¹⁸⁰

This caveat is a result of several long-running federal lawsuits, including one filed in 2000 challenging the Hamilton County Prisoner Reimbursement Policy. Under that policy, \$30 in cash from personal belongings was taken at the time of initial booking from all prisoners, including pre-trial detainees, who had not yet been convicted. The U.S. District Court for the Southern District of Ohio held that the jail’s policy violated the Fourteenth Amendment’s guarantee of due process because the pre-trial detainees were not given a pre-deprivation opportunity to be heard.¹⁸¹ Hamilton County was ordered to refund approximately \$1 million in prisoner fees and to pay \$150,000 for a prisoner educational program.¹⁸²

Nevertheless, pay-to-stay programs have proliferated. The Corrections Center of Northwest Ohio recently began charging prisoners a \$100 booking fee upon arrival and \$67.77 a day for each day of incarceration.¹⁸³ But even if the newer pay-to-stay programs heed federal courts’ orders that fees may only be assessed against convicted prisoners, the question remains whether these policies, which assess astronomical fees from prisoners, many of whom are indigent and cannot pay, are ever sensible as a policy matter or fiscally prudent.

The Sheriff of Clermont County, A.J. Rodenberg, has stated that his county’s plan to charge prisoners has been “a complete failure.” According to the Sheriff, “[w]hen it came time to collect the pay-to-stay, it ended up costing almost as much if not more to run the program.”¹⁸⁴ This is because the majority of prisoners were indigent before they arrived in jail, and many of those who had means became indigent as a result of their incarceration. The program, thus, was not a sensible way to reimburse taxpayers for the expenses of running correctional facilities and interfered with the released prisoners’ ability to reenter society.

III. Recommendations

1. Individuals who were deprived of statutory protections when LFOs were imposed, or who have served sufficient time in jail to satisfy their outstanding obligations, should have their arrest warrants purged. Each court should systematically review its docket to ensure that there are no outstanding unlawful arrest warrants.
2. Judges who fail to follow proper procedure for dealing with an individual who has failed to pay an LFO should be held accountable.
3. The state legislature should replace mayor's courts with a local court that is part of the state judiciary. These new courts must comply with due process protections for litigants.

GEORGIA

“Courts are supposed to dispense justice, not be looked upon as cash registers for the government.”

—GEORGIA ATTORNEY JACK LONG

I. LFOs in Georgia

Georgia’s Constitution bans any form of debtors’ prisons.¹⁸⁵ Moreover, state law prohibits the imposition of fees on criminal defendants before sentencing¹⁸⁶ and, in the case of felons who are unemployed or adjudicated indigent, waives the mandated collection of fees as a condition of probation, release, or diversion.¹⁸⁷ Georgia courts have consistently held that debtors cannot be criminally prosecuted¹⁸⁸ and have barred the imprisonment of persons who are willing but unable to repay a debt.¹⁸⁹ Despite this clear law, indigent Georgians are often jailed solely for the nonpayment of fines and fees.

The widespread imprisonment of indebted Georgians stems from governmental efforts to pad their budgets and is exacerbated by Georgia’s inadequate support of public defender services. Fines are one of the largest sources of revenue for some counties.¹⁹⁰ In an effort to shift more costs from the public to those individuals ensnared in the criminal justice system, counties have raised the amounts of fines, fees, and costs that can be imposed on defendants.

Unfortunately, many defendants and prisoners are too poor to pay, which pushes counties and municipalities to turn to increasingly draconian debt collection methods, such as debtors’ prisons. Some defendants are poorly served by their attorneys, who fail to challenge collections methods that violate their clients’ state law and constitutional rights.¹⁹¹ Moreover, though Georgia does not make data available as to the racial breakdown of LFO assessment and collection, demographics suggest that a disproportionate number of those affected by debtors’ prisons in Georgia are minorities. African Americans constitute approximately 30% of Georgia’s population,¹⁹² but make up the majority of those in the correctional system, with 2,068 African Americans per 100,000 of the population incarcerated in 2005, as compared to 576 Latinos and 623 whites.¹⁹³ Further, in 2008, 32% of African Americans and 32% of Latinos lived below the poverty line, while only 11% of their white counterparts did.¹⁹⁴ Though it should be verified by further study, overrepresentation of communities of color among the correctional population and among the poor of the state suggests that debtors’ prisons may be racially skewed.

Among the many indigent Georgians who have been caught up in Georgia's debtors' prisons is Frank Hatley. Mr. Hatley was incarcerated for a total of 19 months for nonpayment of child support, even though he does not have any children. For eleven years, Mr. Hatley regularly made payments to support a child he thought was his son. Following a DNA test conducted in 2000, Mr. Hatley discovered that the child was not his biological offspring. Although no longer liable for future child support, Mr. Hatley was ordered to pay thousands of dollars in back support accumulated during the eleven years that he mistakenly believed the child to be his own. Mr. Hatley continued to contribute a portion of his meager earnings and unemployment benefits to pay the back support. In 2006, he was jailed for six months—without a lawyer—when he fell behind on payments while unemployed, but he resumed making payments after his release.¹⁹⁵

In 2008, Mr. Hatley lost his job, became homeless, and was living in his car. Yet he continued to make child support payments with his unemployment benefits. Despite his efforts to pay, in June 2008, he was sent to jail for nonpayment by a Cook County judge, again without an attorney. Recognizing the injustice of the situation, Cook County Sheriff Johnny Daughtrey alerted Sarah Geraghty, an attorney with the Southern Center for Human Rights, to Mr. Hatley's plight. The Southern Center filed a petition for release on Mr. Hatley's behalf and, in July 2009, over a year after his initial imprisonment, he was finally released from jail. In August of that year, the Superior Court of Cook County relieved Mr. Hatley of his obligation to pay child support. Despite this ruling, the State took Mr. Hatley's money two more times, requiring further intervention from the Southern Center.¹⁹⁶

Similarly, Ora Lee Hurley was represented by the Southern Center in a 2006 habeas petition that sought her release from the Gateway Diversion Center in Atlanta. In July 2005, a Sumter County court sentenced Ms. Hurley to 120 days in a jail diversion center for violating the terms of her ongoing probation for a 1990 drug possession charge and conditioned her release on the payment of a \$705 fine. Eight months after the end of her 120-day sentence, Ms. Hurley was still being held at the diversion center solely because she was unable to pay the fine. Participating in a work release program, Ms. Hurley worked at a local restaurant where she earned \$700 per month. She gave her entire paycheck to the Department of Corrections, and the Department took most of it per the terms of the work release program, leaving her only \$33 per month with which to purchase necessities and to pay her fine.¹⁹⁷

Within days of the lawsuit's filing, the Southern Center worked out an agreement with the Georgia Department of Corrections whereby a portion of the funds paid to the diversion center as "rent" were applied to Ms. Hurley's fine. Ms. Hurley was then released from the diversion center. Her incarceration cost the taxpayers approximately \$15,000 per year.¹⁹⁸

In another example of nickel-and-diming the poor, Sheriff Winston Peterson of Clinch County spent seventeen years regularly and illegally charging pre-trial detainees for the costs of room and board.¹⁹⁹ In some cases, Sheriff Peterson gave individuals unable to pay these costs

a false “choice” of either signing a promissory note—to be enforced later—or being returned to jail.²⁰⁰ In November 2004, the Southern Center for Human Rights filed a lawsuit raising federal and state law claims on behalf of two individuals who had been so threatened by Clinch County law enforcement officers. The case was settled in 2006 after Sheriff Peterson and Clinch County agreed to stop the practice and return any “room and board” fees paid by detainees since 2000.²⁰¹

Children Caught Up by Debtors’ Prisons

“Mary”²⁰² is a leader of a child advocacy program that supports parents and children caught in the criminal justice system. Parents in Douglas County, Georgia, where the program operates, are concerned that children are being arrested at school for non-violent offenses, such as “disruptive conduct” or “disturbance of the peace,” and end up unnecessarily jailed, fined, placed on probation, and then incarcerated when they are unable to pay the fines and probation fees.

Mary’s own daughter, “Beth,” was a victim of these practices. Beth was diagnosed with bipolar disorder and attention deficit hyperactivity disorder (ADHD) when she was in the third grade. Consistent with federal disabilities laws, she had an Individualized Education Program (IEP), but the IEP was not successfully implemented. After an examination by a tribunal, Beth was advised that mainstream education was not appropriate for her based on her record of outbursts and other infractions. She was then sent to an alternative school.

After enrolling in the alternative school, Beth’s medication was continually changed. She was committed to a mental health facility several times and was unable to meet the rigorous demands of the alternative school. One day, she kicked a school filing cabinet out of frustration. She was arrested, taken into custody, and ultimately fined and incarcerated in the Youth Detention Center. She also once stole a pack of gum, for which her parents had to pay a court fine plus an additional fine of \$485 to the store. Beth was then caught stealing school supplies from a discount store. She pled guilty to the theft, was fined \$1,700 by the court, and placed on probation at a cost of \$40 per month.

With the help of her mother, Beth regularly made her \$40-a-month probation fee payments as well as payments toward the fines. She even asked the probation officer to convert the fines to community service, and she initially tried to fulfill that requirement. Ultimately, the burden of transporting Beth to and from the community service jobs designated by the probation office proved to be too heavy for her two working parents.

Once Beth turned seventeen and was no longer a juvenile, she was transferred to the adult probation system. Her new probation officer was unfamiliar with her mental health diagnoses,

“Altogether, we have been fined about \$4,000 plus probation fees. It’s a definite racket and source of income for the judicial system, paid on the backs of the people who can least afford it.”

—“MARY,” whose disabled daughter was jailed for several days for failing to pay LFOs.

and as a result, never contacted Beth’s parents about scheduling appointments and keeping up with payments. When notified by Beth’s parents of her mental health status, the new probation officer stated that Beth’s affairs did not need to be disclosed to them because Beth was of legal age. Ignoring her parents’ requests to be kept informed, the probation officer contacted Beth directly and Beth began to miss payments, appointments, and court appearances—not because she did not want to keep the commitments, but because her mental illness interfered with her ability to meet them. Beth’s mother found out about the outstanding warrant only when she received notice from the Social Security Administration advising the family that the warrant disallowed Beth’s disability benefits and that repayment of the benefits was required.

Beth was then arrested for violating probation. When she was brought before the court, accompanied by her mother but without an attorney, the judge did not ask her whether

she was able to pay the fine, even though Beth was clearly a child who was unemployed, disabled, and receiving mental health care. Nor did the judge inquire whether the parents were able to gather enough money to pay the fine. Instead, the court jailed Beth in an adult facility for the missed payments.

Beth’s mother ultimately came up with the money a few days later in order to get her daughter out of jail. “Altogether, we have been fined about \$4,000 plus probation fees. It’s a definite racket and source of income for the judicial system, paid on the backs of the people who can least afford it,” says Mary.

After Beth got out of jail, she had several more run-ins with law enforcement and was ultimately re-arrested and placed on probation again. Beth is now 21 and is still on probation. She has been attending school to acquire her GED over the past several years and has successfully completed the requirements this year. She plans to attend junior college and major in Computer Office Technology. The family is still paying the probation fees and also paying back the Social Security disability benefits at a rate of \$80 per month.²⁰³

II. Special Focus: Georgia's For-Profit Probation Companies

In many courts across the state, Georgians who are convicted of traffic violations or misdemeanors and are too poor to pay their fines immediately are placed on probation under the supervision of private, for-profit companies until they can pay off their fines. These companies charge probationers substantial monthly “supervision fees” and other added costs, meaning that some indigent probationers, under a constant threat of jail, end up paying double or triple the amount that a person of means would pay for the same offense.²⁰⁴

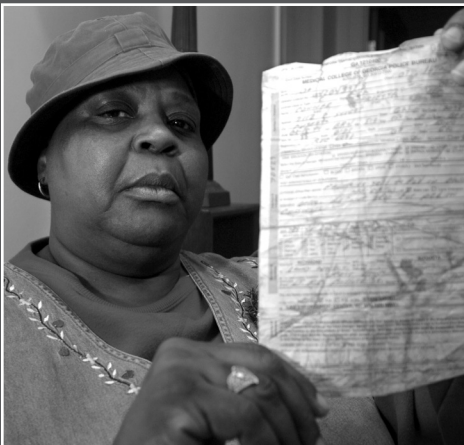
For example, Sentinel Offender Services LLC, a private company, contracts with Richmond County to supervise and collect the fines from probationers. There are approximately 5,000 probationers under Sentinel’s supervision in Richmond County and more than 40,000 statewide.²⁰⁵ Sentinel bills these probationers \$30 to \$35 a month in surcharges on top of their fines. In addition, many defendants must pay steep fees for classes on anger management or drunk driving; others have to pay a startup fee of up to \$208 and \$6 to \$12 a month for a monitoring system.²⁰⁶ Paying the various surcharges leaves probationers with even less money available to pay down the original debt—for example, in the case of Marietta Conner, described below, only \$1 from her September 2007 \$20 payment to Sentinel went toward her fine.²⁰⁷ Release from probation is often conditioned on the full repayment of both the fine *and* all surcharges.²⁰⁸ These policies guarantee that indigent probationers end up paying more in fines and fees than better off defendants who can pay fines upfront.

Jail for nonpayment is a constant threat and a frequent reality among those trapped by private probation companies. Hills McGee of Richmond County is a mentally ill veteran who survives on \$243 a month in disability payments. Because he could not pay Sentinel \$186 in fines, he was arrested on January 12, 2010. He spent the next 14 days in jail, at a cost of \$700 to the county. Mr. McGee was released from jail on January 28, shortly after a local attorney, John “Jack” Long, brought suit on his behalf. Mr. McGee’s lawsuit raised constitutional challenges to Georgia’s private probation statutes and the public defender application fee. Mr. Long succeeded in convincing the court to void the probation violation and overturn the underlying convictions, but Sentinel continued its attempts to collect.²⁰⁹ A federal court is now considering Mr. McGee’s case.²¹⁰ On April 29, 2010, the court entered a permanent injunction prohibiting Sentinel from collecting any further fees from Mr. McGee. His constitutional challenge to the private probation laws and the application fee on behalf of himself and a class of other similarly situated individuals is pending.²¹¹

Misguided Incentives

Attorney Long regularly represents indigent people seeking release from the state's debtors' prisons. As he describes it, "the problem with outsourcing probation services is that it involves the wrong incentives. Private businesses want to make a profit, and that is the way businesses operate. Courts are supposed to dispense justice, not be looked upon as cash registers for the government."²¹²

The longer someone is on probation, the more money a person must pay to Sentinel in surcharges. Thus, Sentinel has a clear financial interest in keeping individuals on probation for as long as possible. For instance, Sentinel often seeks to extend the amount of time over which it may collect fees by asking the court to have defendants serve their sentences consecutively, rather than concurrently. It has been accused of threatening defaulting probationers with



Marietta Conner. (Image courtesy of the Augusta Chronicle. Sandy Hodson, *Critics say private probation punishes poor unfairly*, AUGUSTA CHRONICLE, Nov. 15, 2009.)

MARIETTA CONNER

"On July 31, 2007, I went to court for a traffic violation: 'fail[ing] to yield to a pedestrian.' I took a bus and got to court early that morning. Besides the money for my bus fare, I brought an extra \$50 with me in case I had to pay a fine. I sat in court all day and watched as the judge gave out fines as high as \$200. I realized that I probably would not have enough money to pay a fine, and became worried.

"Eventually, my name was called. I could not afford an attorney but one was not offered to me. Without talking to an attorney, I waived my right to counsel and pled 'guilty.' The judge ordered me to pay a \$140 fine. When I let the judge know that I did not have \$140, he had me leave the courtroom to speak with the court's clerk. The clerk told me that if I did not have the full \$140 before the court

closed in thirty minutes, I would have to be put on probation. I told the clerk that I did not have \$140, and that I did not know anyone who could loan me that much money on such short notice. So I was placed on probation, and a schedule was worked out where I had to pay \$39 a month. An investigator from the Southern Center for Human Rights saw the whole thing, and I spoke to her after the hearing.

"Once a month, I had to ride two buses to get downtown to the probation office to pay my bill and meet with my probation officer. As a retired chef and a caterer, I live off of my social security and disability benefits. My small benefit check is stretched to pay all of my food, transportation, and medical bills, and anything else I need. So it was very difficult for me to regularly make these probation payments. At one point, I even had to borrow money from other people to get ingredients to bake and sell pies to have enough money to pay my probation bill.

jail. Sentinel links its probation officers' performance evaluations to the amount of money collected from probationers, thereby further encouraging abusive practices.²¹³ Worse, should an individual fall behind on payments, Sentinel can request that the court issue an arrest warrant, which often leads to imprisonment for civil contempt of court.²¹⁴

According to Mr. Long, unlike the government, probation companies are not burdened by concerns about the cost effectiveness of jailing indigents for failing to repay small fines. It costs county taxpayers \$50 a day to house a person in county jails.²¹⁵ If a person on probation were to end up behind bars for several days for falling behind on repaying a \$100 fine, the county would quickly spend more on housing the person than it could hope to collect from the probationer's debt. Since private probation companies do not bear the costs of incarceration or overburdened courts, however, there is nothing discouraging them from referring large numbers of defaulting probationers to the courts and, potentially, jail.

"On my fifth monthly visit, my probation officer told me that, according to the computer, I had missed a payment, and that if I could not make the payment, a warrant would be issued for my arrest and I would be sent to jail. I showed the probation officer a receipt for the 'missing' payment and, although the officer corrected the record, no one never even bothered to apologize to me.

"Sarah Geraghty at the Southern Center for Human Rights reviewed my records and found that I had made a total of \$185.99 in payments, but that only \$56.99 had gone towards paying off my original fine of \$140. The private probation company had taken \$93, and the other \$36 went to the Georgia Crime Victim's Emergency Fund (GCVEF). Sarah filed legal papers on my behalf, and I was released from probation. If Sarah had not helped me, I probably would still be on probation and 'paying off' my fine.

"The criminal justice system has a way of putting a twist on poor people. No one told me what my fine would be until after the judge spoke to me. By then, it was too late for me to collect the money or ask to borrow it from anyone. If I had had \$140 on the day I went before the judge, I would have paid it, but I did not have the money. I was just too poor to pay the fine.

"I am a pastor, spent time in the army, and am a good person. I did not deserve being put on probation just because I didn't have \$140. It was very stressful, and I should have never been put through that. The courts need to be patient and more sympathetic to people. And, when people with authority do wrong, they should apologize and try to make amends.

"I know a lot of other people who were similarly mistreated by the criminal justice system, but who were too scared to stand up, so I had to stand up for myself and everyone else. Right is right, and wrong is wrong. The system needs to be changed, not to make it favor one person or another, but so that it is fair to everyone. The poor should not have to pay more than the rich, and the rich should not have to pay more than the poor. I believe in the criminal justice system, but I also want it to be fair. It is not right that people with authority can make other people feel like nothing—just nothing!—but never have to face any consequences or even apologize."²¹⁶

Public Defender Fee Is Another Obstacle

Working in tandem with the burden placed on poor people by private probation companies is Georgia's law requiring all poor criminal defendants who request a public defender to pay an upfront \$50 application fee.²¹⁷ Though the law requires a court to waive the fee if the individual is unable to pay it, the reality is that most individuals are not given the opportunity to demonstrate their indigence and instead waive their constitutional right to a lawyer because they cannot afford this fee.

Lisa Harrelson was cited by Richmond County police officers for driving under the influence on July 28, 2007. At an unrecorded hearing two days later, Ms. Harrelson, unable to pay the \$50 fee, waived her right to counsel and pled guilty to the charge of driving under the influence. She was sentenced to serve nearly a year of probation and pay a \$400 fine as well as a \$251 surcharge.²¹⁸

Ms. Harrelson did find a lawyer after her conviction. After unsuccessfully attempting to withdraw her guilty plea, Ms. Harrelson's attorneys filed a lawsuit against Sentinel and the County Solicitor in the Richmond County Superior Court on February 18, 2008. The lawsuit both sought her release from probation and challenged the \$50 appointment of counsel fee.²¹⁹

Ms. Harrelson won her release and a default judgment against Sentinel for \$500, which covered all the monies she had paid to the company. Sentinel and the solicitor appealed to the state Supreme Court. On appeal, Harrelson's attorneys also challenged the constitutionality of the state's private probation laws.²²⁰

In its amicus brief, the Southern Center argued that the \$50 public defender application fee and the private probation statutes were unconstitutional. They asked the Court to strike down the public defender application fee statute because the law effectively "chilled" or discouraged poor people from exercising their right to free legal counsel by making them choose between paying the fee upfront or forgoing an attorney.²²¹

The private probation scheme, in turn, violates the U.S. Constitution's Equal Protection Clause because it results in harsher punishments for indigent defendants than those imposed on wealthier defendants.²²² The scheme bears no rational relationship to cost efficiency, as all surcharges are paid to Sentinel, not the state of Georgia.²²³ The Southern Center also argued that it violates the Eighth Amendment's prohibition against excessive government fines.²²⁴

It is one thing to merely privatize a judicial function for reasons of efficiency, but quite another when it disproportionately affects a segment of the population—in this case, poor probationers—and extracts from them a harsher penalty than those who have more financial means.²²⁵

Though the Georgia Supreme Court sidestepped the constitutional challenges in *Harrelson* by upholding the lower court's ruling as to Ms. Harrelson's release and damages,²²⁶ these same questions are now pending before a federal court in the above-discussed *McGee v. Sentinel Offender Services*.

Widespread Problems

Debtors' prisons are not unique to Richmond County. The city of Americus, Georgia, for example, is still under contract with the Middle Georgia Probation Company to provide its probation services. The company, which charges \$35 per month in supervision fees on top of the fines and fees that probationers owe the court, has been the subject of multiple complaints over the years. In 2008, the Southern Center led a march to an Americus City Council meeting to protest the contract.²²⁷ Probationers told City Council members that they are routinely harassed and threatened with jail time for not being able to pay their fines.²²⁸ The public cannot even assess whether outsourcing the City's duties to Middle Georgia saves the city money, because private probation companies are exempt from disclosure requirements placed on public entities.²²⁹ Further, the essence of the company's job description—"supervision"—may be falling by the wayside, as some suggest that the private company functions less as a means to help probationers and more "as a moneymaking fee-collection service." For example, individuals report asking the probation company for guidance to help battle alcoholism-related problems and get back on track, only to hear: "We don't do that."²³⁰

The push for aggressive collection practices in Georgia, like in other states, continues to this day.²³¹ In 2007, private probation companies supported a bill that sought to expand their authority from supervision of people on misdemeanor probation to supervision of people convicted of felonies and to increase private probation fees to \$50 per month.²³² Though the bill did not pass, it could be resurrected, since the private probation industry has pledged that it will continue its efforts to expand its reach over more Georgians.²³³

III. Recommendations

1. Educate defense attorneys and prosecutors on state laws limiting the imposition of fines and fees, and the Georgia Constitution's absolute bar on debtors' prisons.
2. Train state judges on the constitutional restraints on their contempt power to punish debtors unable to pay their LFOs, as well as on the statutes governing when and how fines and fees can be imposed and collected from indigents.
3. Establish objective measures to guide judges in determining a defendant's indigence, and audit judges to ensure that these measures are consistently applied to all defendants.
4. Redesign work release programs to focus on reducing recidivism by developing skills and establishing fair mechanisms to help individuals close out their legal financial obligations. For example, any "rent" and/or other fees paid to the state while under its supervision should first be applied to an individual's fine.
5. Return the operation of probation services, jails, and other parts of the criminal justice system to state and local governments, to eliminate perverse incentives for private probation companies to criminalize poor people.
6. Eliminate the application of any prehearing fees or costs, particularly the \$50 application fee for public defender service.

WASHINGTON²³⁴

“I understand I committed a crime, I did my time. Okay. I understand that. But, to come after someone from 1991, 1992, 1997, that’s ridiculous.”

—“NICK” was incarcerated for two weeks in 2009 after he failed to make a \$60 payment on his legal debts.

I. LFOs in Washington State

Under Washington State law, “[w]hen a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence”²³⁵ and may impose punishment for nonpayment, including jail time.²³⁶ There are no fewer than 28 separate fines and fees that a judge may impose on a criminal defendant, depending on the offense and sentence. Twelve percent interest accrues on all unpaid legal debts from the date of sentencing. Courts are required to find that the defendant’s failure to pay was willful before they may impose jail time for nonpayment,²³⁷ and are supposed to take into account the reason for their failure to pay in determining whether nonpayment was willful.²³⁸ The Ninth Circuit Court of Appeals, which covers Washington, has also recognized that a defendant cannot be incarcerated merely for failure to pay a fine, “unless it can be proved that the defendant did not make bona fide efforts to pay” or that other forms of punishment would not satisfy the state’s interest in punishment or deterrence.²³⁹ Nor may a sentence be imposed that would result in a longer period of incarceration for an indigent defendant than one who has the ability to pay his or her LFOs.²⁴⁰ Although these laws purport to provide some minimal due process protections before defendants are jailed for unpaid legal debts, Washington courts do not consistently follow them.²⁴¹ In fact, the state has particularly insidious penalties and collections schemes reserved for the poorest criminal defendants that land them in jail and keep them ensnared in the criminal justice system for decades, all because they cannot pay their LFOs.

Some counties in Washington have adopted “auto-jail” policies, which require defendants to report to jail if they are unable to pay their legal debts, and subject them to arrest if they do not so report. In 1999, James Nason pled guilty to second-degree burglary and was sentenced to 30 days in jail and \$750 in fines and fees.²⁴² Over the next seven years, he made some payments and missed others. When he was arrested in 2006 for failing to pay his LFOs and failing to appear in court, he was unemployed, living out of his car, and had no income other than a \$152 monthly allotment in food stamps. Interest accruing on his LFOs had more than doubled his debt. The prosecutor argued that Mr. Nason’s failure to pay had been willful because there was

no evidence that he had tried to pay off his LFOs, and that he could have done so by collecting aluminum cans. The court entered an order requiring Mr. Nason to pay \$25 per month, or to report to jail on January 17, 2007, if he had failed to comply. Under the court's order, if he failed to turn himself in, Mr. Nason would be arrested and incarcerated without any hearing to determine whether his nonpayment was willful or the result of his poverty.

Mr. Nason was arrested again in April 2007, sentenced to 120 days in jail, and ordered to pay \$30 per month after his release—or else he would once again be required to turn himself in to serve another 60 days. Mr. Nason's attorney argued that such "auto-jail" orders are unconstitutional because they impose jail time without providing a defendant the opportunity to explain his inability to pay,²⁴³ and result in the incarceration of indigent defendants who, like Mr. Nason, had no means of paying off their debts.²⁴⁴ While Mr. Nason's appeal was pending before the Washington Supreme Court, Spokane County ended the "auto-jail" policy after a trial court judge in a different case ruled that it was unconstitutional. In June 2010, the Washington Supreme Court reached the same result, finding that the "auto-jail" policy had violated Mr. Nason's right to due process because it required him to report to jail without making a contemporaneous determination of his ability to pay.²⁴⁵

In Washington, as in many other states, courts may order that defendants pay for court-ordered rehabilitation programs while on parole. For many defendants, their inability to pay for these programs becomes another path back to jail: the costs of these programs are prohibitive, and poor defendants who cannot afford them face the risk of violating parole and being incarcerated. Keith Nash, convicted in 1999, was required to attend a rehabilitation program after his release.²⁴⁶ The course required an \$800 enrollment fee, as well as a payment of \$50 per week. Mr. Nash, who was homeless and unemployed when he was released, was unable to pay the program fees or the \$3,976 the court had ordered him to pay in non-restitution LFOs. By February 2008, when Mr. Nash asked the court to waive his LFOs because he could not pay, the amount he owed had grown to more than \$8,000 due to the interest penalty.²⁴⁷ He explained to the court that because he was unemployed, he could not pay for the program, and without treatment for his mental health condition,²⁴⁸ he would be unable to find employment.²⁴⁹ The court denied his request, stating that it had to do so because if it waived Mr. Nash's LFOs it would encourage other defendants to make similar requests.²⁵⁰ Mr. Nash's appellate attorney argued that the process by which the court denied Mr. Nash's petition to waive his LFOs violated his due process rights because it failed to meaningfully consider his ability to pay, as required by law.²⁵¹ The case is currently pending before the Washington Court of Appeals.

Even juveniles who have shown that they were too poor to pay their legal debts have been sanctioned. In 2006, N.S.T.,²⁵² a fourteen-year-old girl, threw a rock through the window of an acquaintance's home during an argument.²⁵³ Because she was a juvenile, the court granted her a deferred disposition, agreeing to dismiss the charges if she satisfied certain conditions, including community service, counseling, abstaining from drugs and alcohol, and paying \$2,630.40 in restitution at a minimum rate of \$10 per month.²⁵⁴ N.S.T. complied with all of the

court's terms, except that she fell \$5 behind on her monthly payments by November 2008. The state then filed a motion to revoke her deferred disposition, even though it acknowledged she had complied with all other conditions of her sentence. At a hearing, N.S.T. testified that she was working as many hours as her employer allowed her and her mother testified that she had contributed all she could.²⁵⁵ The trial judge was sympathetic to N.S.T.'s predicament, stating on the record, "You did everything that you were asked to do with the exception of the financial obligations." The judge nevertheless revoked N.S.T.'s deferred disposition, holding that he was "bound by the confines of the legislature . . . I have no option but to revoke." However, the judge clearly felt there needed to be a change in the law, stating, "[s]omebody should go down and lobby Olympia about this."²⁵⁶ The consequences N.S.T. will suffer from her revocation will extend well beyond her youth. "It will definitely affect her ability to get a job, or housing or student loans in the future," explained Vanessa Lee, N.S.T.'s appellate attorney. "Even though her juvenile record is sealed, if she's ever asked on an application whether she's been convicted of a crime, she'll have to say yes."²⁵⁷

On appeal, the court upheld the trial court's decision, finding that because N.S.T. and her family had not provided documentation of their income, assets, living expenses or efforts to find other sources of income, they had failed to show that her nonpayment of LFO's was non-willful.²⁵⁸ Although federal law requires a finding that nonpayment of LFOs was willful before imposing punishment for failure to pay,²⁵⁹ the court penalized N.S.T. by requiring her to show that her nonpayment was *not* willful, and finding willful nonpayment even after testimony from N.S.T. and her mother explaining that they were both underemployed due to the economic downturn and that they were barely able to pay their household bills.²⁶⁰ Ms. Lee has appealed the court's decision to the Washington Supreme Court.

The Imposition of LFOs is Racially and Geographically Skewed

In 2008, the Washington State Minority and Justice Commission, an investigative body of the Washington Supreme Court, released a study on fines and fees assessed for felony convictions in the state. The study analyzed state criminal justice data, as well as the results of fifty interviews with individuals convicted of felonies in Washington State. It found that the race and ethnicity of the defendant, the nature of the crime, the type of adjudication and county characteristics significantly influence the amount of LFOs assessed, even after controlling for other relevant legal factors.²⁶¹

The fact that the imposition of LFOs is racially skewed is hardly surprising. Racial disparities exist throughout Washington's criminal justice system, not just in its prisons and jails. The U.S. Court of Appeals for the Ninth Circuit recently recognized that in Washington State, the criminal justice system is "infected with racial bias."²⁶² The court found that African Americans and Latinos in the state were disproportionately arrested for drug possession and delivery,

and were far more likely to be searched and less likely to be released without bail than their white counterparts.²⁶³ African Americans were 70% more likely to be searched than whites in similar situations; Latinos were 50% more likely to be searched.²⁶⁴ As the Commission found, these disparities extend to LFOs: Hispanic defendants received significantly higher monetary sanctions than white defendants convicted of similarly serious crimes. Persons convicted of drug offenses typically received significantly higher fees and fines than those convicted of violent offenses.²⁶⁵

The Commission also found that those who opted for trial received fines and fees that were close to one-third higher than those who pled guilty.²⁶⁶ This “trial penalty” was not consistently applied across all Washington State counties. In fact, in King County, which includes Seattle, defendants who opted for trial did not receive significantly higher LFOs than those who accepted a plea.²⁶⁷

The Commission report concluded that substantial debt from LFOs poses a significant, and at times insurmountable, barrier for men and women attempting to re-enter society after their release from incarceration. They see their incomes reduced, their credit ratings worsen, their prospects for housing and employment dim, and their chances of ending up back in jail or prison increase as a result of unpaid LFOs.²⁶⁸

The Insidious Effect of the Interest Penalty

The vast majority of defendants in Washington are unable to pay off their LFOs within three years of their convictions. The Commission found that over 80% of men and women who had been assessed LFOs in 2004 had failed to pay off even half of their legal debts by 2007.²⁶⁹ Washington imposes a 12% interest penalty on unpaid LFOs, including restitution, fees, costs, fines, and interest.

The 12% interest penalty operates to convert what may start as a modest penalty into a massive lifetime debt. The median LFO assessed for a felony conviction in Washington in 2004 was \$2,540.²⁷⁰ Due to the interest penalty, a person who makes monthly payments of \$25 toward this LFO would still have a legal debt that would keep them entangled in the criminal justice system, and at risk of being jailed, 30 years after their conviction.²⁷¹ Someone who was capable only of paying down the median LFO at a rate of \$10 per month would find that his debt had ballooned to over \$56,000 after 30 years.²⁷²

By lengthening the amount of time necessary to pay off LFO debt, the interest penalty also imposes other hardships: individuals who have not paid their LFOs in full may be served with warrants and face further jail or prison time solely for nonpayment. Furthermore, when legal or background checks are made on individuals who have not fully paid their LFOs, their

records appear as active in the superior court, which can have serious negative consequences for employment, housing, finances, and other criminal justice outcomes long after they have finished serving their jail or prison time and community supervision.

Many defendants who are saddled with LFOs resort to making small monthly payments to satisfy their debt. In some cases, the courts order these periodic payments in lieu of sending a defendant back to jail. Though the amounts of these monthly payments typically are modest, ranging from \$10-\$50 per month, they do represent a significant portion of the incomes of many who have legal debts, most of whom have incomes that fall below the federal poverty line.²⁷³ At times, even these small payments require these men and women to make hard choices each month. As one person interviewed by the Minority Commission put it:

I take it [the LFO payment] out of my social security check, it's part of my budget, so at the beginning of the month, I make my budget, I pay my rent, I pay my house fees, because there's a fee to pay at the house where I'm at, for toilet paper, laundry, soap, stuff like that, and then I also put money, I get the money orders for paying my LFOs. But sometimes I don't have enough left over for food.²⁷⁴

II. Special Focus: Four Case Studies of Men and Women and Their Lifetime Struggle to Manage Their Legal Debts

This section presents stories from four individuals who have carried legal debt for an average of ten years and investigates the financial, social, emotional, and legal consequences of literally being unable to afford their criminal convictions.

While case studies can in no way be representative of the thousands of men and women riddled with legal debt in Washington State, an analysis of their lives sheds light on the ways in which legal debt can accumulate, the ways in which they attempt to manage their debt, and the consequences they, their families, and their communities face from their legal debts.

The case study participants raised several consequences of owing legal debt in Washington State: the accumulation of debt, constrained opportunities, and the constant emotional strain of being tethered to the criminal justice system. Their primary concern was the relatively large amount of debt imposed compared to their incomes, and the fact that the debt continuously accumulates as a result of the 12% interest rate and additional collection fees imposed on them. Respondents experienced constraints on their housing, employment, and other life opportunities as a consequence of this debt. Furthermore, when they were unable to make regular payments toward their LFOs they experienced repeated contact with the criminal

justice system, and some were re-incarcerated.

All of those interviewed felt that it was fair that they were charged legal fines, fees, and restitution for their offenses. They clearly recognized the harm that they had done to their individual victims and society and wanted to make amends. However, they did not believe the State had a right to profit from the fines and fees by charging interest and additional surcharges. Thus, they found it unconscionable that their poverty and inability to make payments should be reason to remain under—in some cases—intense justice system supervision. People interviewed said they wanted to “pay their debts to society” but at the same time have a fighting chance at living crime-free lives once they served their prison and jail sentences. “Reuben” describes this sentiment:

Interviewer: Do you think you should have to pay back the money?

Reuben: Yeah, absolutely, it was a part of the judgment and sentence, and I have no qualms about it. I’m willing to pay it, every single dime. Unfortunately, you know they took the opportunity, that opportunity and made it a capital opportunity for themselves. They knew my situation. You know, I was broke, that’s the reason I did what I did and I was still broke in the prison system, so they basically took advantage of the situation and said, ‘If you can’t pay, we’re going to put interest on it.’²⁷⁵

“Kathie:” Constrained Opportunities²⁷⁶

Kathie is a 49-year-old white woman who has four children, three of whom she supports financially. She is divorced, but lives in an apartment with her ex-husband and his father, along with three of her children. She works for a re-entry education program and makes roughly \$3,000 a month. Kathie is eighty percent deaf and her employment options are limited. Kathie has eleven felony convictions in Kitsap County for forgery, stolen property, and possession of stolen property. She attributes much of her criminal history to living in poverty and having a drug addiction. Her initial LFO amounts from the felony convictions were approximately \$11,000, but her total debt now as a result of the 12% interest is \$20,000.

Kitsap County, where Kathie was convicted, has transferred her defaulted legal debt to a collections agency, which now constantly hounds her for payment on the full debt and will not negotiate a realistic payment schedule with her. While she was extremely grateful for her job—she was initially a re-entry client of the program after being released from prison, and worked her way into a permanent full-time position helping to educate released inmates—she feels constant financial pressure, which forces her to remain in a very stressful living arrangement:

Kathie: I have a very chaotic living situation. There's six of us in a three bedroom apartment, that, with living in the same area with my husband that I'm separated from and it's uncomfortable. There's some things that I need to make adjustment for my children. Just because of the situation. And grandpa's 80 something years old and I'm sure he'd like to be rid of us. I mean, it's impacted a lot.

Interviewer: You've lived in this situation for seven years?

Kathie: Yes.

Interviewer: Have you looked for housing?

Kathie: Yes.

Interviewer: What has been your experience?

Kathie: Well, for the most part, anybody who's renting doesn't want anything to do with anyone who has a criminal history. However, there are a few places that would accept me if I could get my credit in line, so having the poor credit [is] a bigger barrier than the criminal history.

Interviewer: Have you tried to get any loans?

Kathie: Oh, absolutely not... I have a car payment. I had to have my father-in-law be the primary person on the loan because they absolutely wouldn't look at me without having a co-signer.

As a result of her LFO debt being placed in default, she now has bad credit. She cannot legally sign a lease for a home, apartment, or a car and feels forced to continue living in her father-in-law's apartment with her ex-husband. In addition to being materially limiting, the debt and resulting constraints make her feel powerless to take control of her life. Kathie describes a sense of despair and fears that she will never be able to get out from under the debt and lead an independent adult life.

Kathie: It's seems like one of those challenges that are insurmountable. It's like a paraplegic trying to climb Mt. Everest. I mean it just seems that impossible. It's like an insurmountable barrier, that seems like, I'm gonna die with this debt hanging over my head. And I'm never gonna be able to have my own little piece

“[T]here are a few places that would accept me if I could get my credit in line, so having the poor credit [is] a bigger barrier than the criminal history.”

—“KATHIE” has been forced to live with her ex-husband and his father for seven years because of her poor credit resulting from her unpaid LFOs.

of property, my own little something. And it's not even about buying a house. I can't even rent a place. So, I, just personally—I mean, I have men who'd like to marry me and all that, want to take care of me. I don't want to have that as an option. You know? I'm a very independent female, always have been and it just seems like this is, not only taking a part of me financially, but it's taken a piece of me spiritually, you know. It's taken a part of my soul. I'm like, how am I going to rectify the situation without, you know, going crazy, or you know? [laughs]

Interviewer: Robbing a bank?

Kathie: Exactly, that's exactly what I was thinking. Doing something in the criminal element and that's where I got started in this place anyway.

Despite this exchange, Kathie says she will not resort to crime. She describes herself as a very resourceful person, one who has learned to try and solve her problems legally. Kathie describes her plan:

Well, my plan is to try and take my student loans and my LFOs, and try to get some of [the] interest reduced off of it and try to get the payment taken out of my check every two weeks, a certain amount and try to pull them out of default. I don't care if I have to pay that off for the rest of my life. I just want to pull them out of default so I can get my credit rectified, so I can get independent and move.

Kathie wants to establish a payment plan with Kitsap County that recognizes her financial situation, but so far she has encountered resistance from the collection agency and feels stuck in a financial black hole. She feels frustrated that, because her debt has been placed in the hands of a collections agency, she believes she is ineligible for a Washington State statute that allows judges to waive interest if an ex-felon has made "reasonable" and "regular" payments toward her LFO debt for twenty-four consecutive months.²⁷⁷

"Nick:" Tethered to the Criminal Justice System²⁷⁸

Nick is a 38-year-old African American man who has been struggling with drug addiction and mental health problems since he was a teenager. He dropped out of high school while in the tenth grade, but completed his general equivalency degree later. He is a divorced father and has a seventeen-year-old son. Nick currently receives state disability payments in the amount of \$339 a month, which are his sole source of income. He has seven felony convictions in Spokane County involving theft, robbery, and drug possession—typical of someone who battles a chemical dependency problem. As a result of three different cases occurring in 1991,

1992, and 1996, Nick was sentenced to a total of fifty-six months in state prison and has had several stints of county jail time. In addition, he has accumulated a total of \$3,178.06 in LFO debt.

In 2009, supported by the Post-Prison Education Program in Seattle, Nick was making headway in his life by taking community college classes and managing his monthly LFO payments of \$30. However, he had a drug relapse and ended up in a homeless shelter in his home county, Spokane County. He had missed two months of LFO payments, but felt he had no means to catch up with the debt. While walking down the street one day, he was detained by local police who ran his name in the county computer system. Because warrants for nonpayment of LFOs show up as warrants for the underlying original charge, it appeared that there were three outstanding warrants against him for theft, robbery and drug possession. Nick was arrested, brought to court for a hearing to determine whether he had violated the conditions of his court supervision and was incarcerated for two weeks in the county jail under the county's "auto-jail" policy, which required jail time for failure to make regular payments on LFOs. Initially the court ordered Nick to serve seventy-five days for each of his three outstanding cases. His public defender and the prosecutor's office reached an agreement that the Post-Prison Education Program would pay \$600 toward each of the three delinquent LFO cases (\$200 per case). He was released; however, the county clerk's office appropriated \$200 for its own collection costs. Accordingly, Nick's two-week jail stay resulting from his failure to pay \$60 in monthly payments cost the county approximately \$1,720 (including a \$250 jail booking fee and fourteen days at a \$105 daily bed rate).²⁷⁹

"It's just like a nightmare. You know? Like is this ever going to go away? And the only thing, I keep hearing the judge say 'if you have to pay \$20 for the rest of your life, that's what you are going to be doing.'"

— "LISA" has been crime-free for nine years, but the more than \$60,000 she owes in LFOs continues to interfere with her credit, her job, and her voting rights.

When asked how the LFOs affected him, Nick describes a defeatist attitude:

Definitely [they affect me]—because I am scared. I don't want to go back to jail for stuff I did in 1991 and 1992. I already did time for it. The LFO was already in the collection agency and they took it out of the collection agency and it makes sure I am still a product of the system. It's like double jeopardy. I served my time. Okay, let it go to collections. And let me deal with it that way. How come I have to go continuously to be involved with the legal system? It's crazy. Mentally, emotionally, you know it messed me up. Because when I make my couple payments and even if I wanted to get a place, I can't afford it—with a

phone bill. I only get \$339 a month, buy a bus pass, and just stuff like that. It stresses me out. It makes it hard already because being a felon; you can't get certain housing because of the felonies. And then to have this stuff come up again, it's like, man, am I ever going to be out of this system? I feel like I am going to be on probation for the rest of my life. There's no possible way. I can't [pay].

I was going to go to Gonzaga legal library and look at resources because of my disability to see if I could get it waived. That's a lot. I mean \$30 a month is a lot, it's just the fact that it's indefinite. How am I going to pay all that back? I owe child support, I owe LFOs, and I owe other bills. I can't get a clean slate. I understand I committed a crime, I did my time. Okay. I understand that. But, to come after someone from 1991, 1992, 1997, that's ridiculous.

Nick had a court review date set in April; his public defender told him he would be re-incarcerated if he has not made regular payments. He could also be re-incarcerated if he does not continually update the clerk's office with his home address, his phone number, and place of employment. Currently, staff at the local homeless shelter allow him to use the shelter's address and phone number, and he is looking for employment. He has not been able to make regular payments for the past two months since he spoke with the ACLU. Toward the end of the conversation he expresses frustration and a sense of despair.

When can I experience a little place of my own? I'm 38 years old. And I've been in and out of the institutions since I was 12, 13, years old....It's man like, wow. And, it gets me depressed.

Nick realistically recognizes that he will be forever connected to the criminal justice system, living an extremely precarious life centered on making regular monthly LFO payments.

Interviewer: When you got out in 2007 and picked back up in 2009. What did that do to you?

Nick: It emotionally and mentally made me feel like a criminal. No matter what they say, there is no equal opportunity in America. There's no justice. Once you've been convicted of a crime you'll always be labeled as a criminal. You're goin' to continue to be convicted of it. This is proof, that was the proof of it right there. I will always have a chance to go back to jail. That's what it did. It lowered my self esteem. You know. Why should I work and do this and do this? If I miss a payment then they can lock me up.

“Reuben:” Accumulation of Debt²⁸⁰

Reuben is a 24-year-old young man of Pacific Islander descent who has been in Washington State juvenile and Department of Corrections (DOC) facilities since he was twelve years old. At age sixteen, the juvenile court in Pierce County declined jurisdiction over him and he was prosecuted and sentenced in the adult prison system for assault, robbery, and possession of stolen property. On the night before his eighteenth birthday he was transferred from special housing in DOC into the general adult prison population to serve the remainder of his sentence.

At his sentencing hearing in Pierce County in 2002, Reuben was given 185 months of incarceration time and a monetary sanction of \$950 (not including restitution). As a result of the twelve percent interest penalty, Reuben’s LFO debt was just under \$6,000 at the time of his interview. Reuben is still under the supervision of DOC and is serving the last four months of his sentence in a work release program. While in prison, Reuben received \$40 per month from DOC, which was deposited into his personal account, of which 5% was automatically garnished to make payments towards his LFOs. The \$2 deduction was significant to him, since Reuben had to use this monthly stipend to purchase a toothbrush, toothpaste, soap, shampoo, deodorant, mailing supplies, and supplemental food (like “Ramen” and “processed meat”).

Interviewer: So, all this stuff, it would total \$40 a month?

Reuben: No, it would total more than that. That’s even hygiene itself manages you around 20 bucks, ‘cause you know people want to stock up for the whole month. About 20, and then 20 will be used for other things like using the mail system, you know buying pre-stamped envelopes. So that itself is about 15 bucks, sending out legal mail and all that. And so 40 dollars will get used up pretty fast.

In addition to his LFO debt—including paying towards the costs of incarceration and supervision once released²⁸¹—Reuben was well aware of other costs associated with his DOC status. While on work release, Reuben generally works thirty hours a week while making \$10.50 per hour. However, the county work release system charges him \$13.50 per day to be in the program. Thus, his expected gross pay for the four months of work is \$7,200, but off the top he will pay the work release program approximately \$1,080 to be in the program. Furthermore, once he is released, he will be required to make a monthly payment toward the cost of his DOC supervision and incarceration. This accumulation of debt while serving a prison sentence was a frequent topic of conversation among Reuben and his fellow work release residents:

It’s one of the only things that we are worried about. You know, they give us this opportunity with a release date, you know to start a whole new chapter, with your debt to society, as far as serving time, but a lot of people get scared. For one, the economy is going bad. Two, they can’t, they know they don’t have

no job lined up for them because they got their first of all, their [criminal] history. And a lot of them don't have the work background like myself. I've been locked up since I've been sixteen. So, I definitely have the record against me and the experience. So, you have a lot of people like myself getting out, you know with debts that are more than \$6000, somewhere up to the 10s, 100s, and 50 thousands, and it's very prevalent on their minds that they will fail if they cannot find a job. And so a lot of them be stressing.²⁸²

*"Lisa:" Constant Emotional Strain*²⁸³

Lisa is a 40-year-old African American who is a wife, mother of three (a 24-year-old, a 20-year-old, and an 18-year-old) and a grandmother of a five-year-old. She lives with her husband, two of her children, and her grandson. She is also financially responsible for her oldest daughter, who is struggling with drug addiction and mental illness and lives in transitional housing. She is currently paying for her 18-year-old to attend college. Lisa has battled drug addiction since she was 18, and has four felony convictions in King County, which include two violations of the controlled substance act, theft, and an assault. She has been drug-free for nine years and now leads a productive life as a program manager for a community-based offender re-entry program. She has designed and implemented a program for women involved in the sex industry, and a city program for men convicted of soliciting prostitutes. Along with her husband, Lisa runs a transitional home for women who have been involved in the sex industry. As a result of her prior convictions and the state mandated interest fee, Lisa owes over \$60,000 in legal financial obligations including fines, fees, and restitution.

Although she has been crime-free for nine years, Lisa's steadily growing financial obligations keep her tethered to the criminal justice system. On three occasions, she was re-incarcerated for a total of forty days for nonpayment. Twice, her community corrections officer found that she had violated the conditions of her community supervision by nonpayment, and she was re-incarcerated without legal representation or a hearing. The third time, she received notice of a warrant for her non-compliance. She attended a pre-established court date with a defense attorney and explained her financial circumstances to the court, but was still incarcerated.

Lisa: I got a warrant for my arrest for failure to pay my legal obligations. And when I went before the judge I tried to explain to him that you know over a period of time that I was addicted to drugs. I didn't have any income and when I did have income I was trying to support myself to stay clean. You know being able to pay my house and things like that. And I didn't have custody of my children at that time so I didn't have a welfare check or anything coming in. And at the times I did work I didn't avoid them but I did have other obligations that I need to pay to live. And so I had to comprise something, for, just for the cost of living

at that particular time. I was making minimum wages it was barely just enough to pay the rent and eat.

Interviewer: What did the judge say?

Lisa: He said he didn't care, because I had an "I don't care attitude." Like I just avoided the fact that I had LFOs. But over the years I had paid like \$5 or \$10, \$50 here. When I could I would pay it. He said I needed to spend a week in jail and think about what my responsibility was.

Despite the fact that she had no regular income, no money in savings, and a notice that her lights were going to be turned off, the judge decided to incarcerate Lisa on the ground that she was "willfully non-compliant" with her legal financial obligations. As a result of these periods of incarceration for nonpayment, Lisa says she now attempts to make regular payments of five to ten dollars a month (in addition to a five dollar payment for her daughter's LFOs). However, she fears that she could be re-incarcerated again, and even lose her job or home because there are months when she is unable to make a payment.

I have a lot more to lose now. I had a lot to lose then, but now I have settled my life a little bit more, I'm stable, I'm self-sufficient to where I can be responsible for my legal obligations. But sometimes it [her finances] may not be enough, I have to make sacrifices [i.e., choose between paying the LFO that month or paying for necessities]. So it could be one of those months I make a sacrifice that they could decide to say I am not being responsible. So I could lose my job, I could lose my home. Who would take care of my grandson?

In addition to the financial and emotional stress, Lisa describes how the financial debt has affected her credit.

It's a reflection on my credit. Just recently when I was trying to refinance my home that it came up that it was like "Oh you owe the county \$60,000." So they didn't know if it was a lawsuit or what. So I am in the process of trying to produce all my documents showing them it's a LFO. It's like a blemish on my credit.

Lisa's legal debt has also hampered her ability to do her job—working with former offenders and people who are incarcerated. When seeking security clearance to enter the state prison, she initially was denied access to visit potential clients because of her current legal status.

In addition to our program we go to prisons once a month where we do intakes and referrals. And that [legal debt] showed up, because your LFO shows that I am under supervision because of the legal obligation. So, it's like I am still

under Department of Corrections financial supervision but it still shows up as me being on DOC supervision.

After several of her prison clearance applications were denied, Lisa turned for help to a DOC liaison who worked with her at the re-entry program and was able to help her get approval to conduct her re-entry work inside the prison. Lisa also notes how this debt looms over her and makes her feel that her employment opportunities, particularly in her field of interest and experience, are very limited.

Overall, it's just a blemish, period. It still suppresses me and a way for me to move forward in life because it is still a reflection on my past. So, it is hard, if I wanted to get a job in corrections or anything in the criminal justice system that would be a [negative] reflection on me. Because it still shows I am in the criminal justice system.

Lisa raises a final point about the impact of LFOs on her life—her inability to vote.

Also, I can't vote because I owe legal obligations . . . I can't vote because of that. That is a really big thing for me as well. There is a lot of things that I do as far as what I believe as being a leader in the community. And so being a leader in the community and not being able to have particular things I can get involved in and voting is one of them.

Prior to a recent legislative change in Washington State, persons with any amount of LFO debt did not have the right to vote. Beginning July 26, 2009, a person with a felony conviction in Washington State who has completed all confinement time and is not under DOC supervision will receive the provisional right to vote. However, until all LFOs are completely paid, if this person fails to make three LFO payments within twelve months, a prosecutor or county clerk can request that the court revoke this provisional right. Many people with LFO debt may not currently be aware of this legal change, nor are they aware of how to inquire about their legal voting status.²⁸⁴

Lisa describes her LFO debt as a nightmare that she cannot escape. She fought her own drug addiction, battled through the sex industry which she used as a way to support her addiction, is raising her grandchild, is helping her daughter fight her own addiction and mental illness, and plays a pivotal role in multiple community re-entry programs in Seattle. Yet she cannot surmount the enormous legal debt that hangs over her head. She knows this is a burden she will carry for the rest of her life.

Interviewer: How often do you think about the LFO debt?

Lisa: All the time. Because I have to do financial literacy [planning], and in that it's part of my budgeting. It's really hard to miss. It's something I have to look at every month. It's like "Oh God." It's just like a nightmare. You know? Like is this ever going to go away? And the only thing, I keep hearing the judge say "if you have to pay \$20 for the rest of your life, that's what you are going to be doing."

III. Recommendations

1. Judges should have the authority to waive all non-mandatory fees, such as court costs, lab fees, and collection fees, when the defendant comes forward with evidence that his or her indigent status is unlikely to change in the future, or when the LFO amount ordered is causing manifest hardship to the defendant.
2. Courts should consider and impose alternatives to the mandatory Victim Penalty Assessment Fee, such as community service requirements. Defendants should be guaranteed the right to seek to have their LFOs reduced or waived if they can show they have made reasonable efforts to pay their legal debts, but have been unable to do so, and that their outstanding LFOs impose a manifest hardship upon them.
3. Prohibit "auto-jail" policies, repeated jail sanctions, and frequent court appearances as part of the LFO collection process in favor of proven, effective collection methods. Defendants who make good faith efforts to pay should not be burdened with a lifetime of LFO debt, and should be allowed to obtain an order terminating non-restitution LFO debt after making a good faith effort to pay for some period of years.
4. The legislature should repeal the statute imposing interest on non-restitution LFO debt. The 12% interest rate currently imposed on such debt penalizes indigents who can afford only small monthly payments, and creates a lifetime barrier to successful re-entry for defendants who have completed their terms of incarceration.
5. The legislature should amend state law to make it clear that the State bears the burden at a probation or parole revocation hearing of showing that a defendant's failure to pay his or her LFOs was willful.
6. The legislature should adopt consistent procedures across the state for determining defendants' ability to pay legal debts. Judges should be required to determine defendants' ability to pay at sentencing based on enumerated factors, including the defendants' employment history and status, their financial situation at the time of sentencing, and their realistic prospects of being able to pay their legal debt.

7. Adopt consistent procedures for the assessment and collection of LFOs across the state. All counties should compile data on LFO assessment and collection in order to monitor consistency of practices.
8. Ensure that the voting rights of those with felony convictions, which are restored automatically upon release from custody, are not later revoked because of a non-willful failure to pay LFOs.

CONCLUSION

The term “debtors’ prison” evokes for many a dark chapter in America’s distant past. The sad truth is that debtors’ prisons are flourishing today, more than two decades after the Supreme Court prohibited imprisoning those who are too poor to pay their legal debts. In this era of shrinking budgets, state and local governments have turned aggressively to using the threat and reality of imprisonment to squeeze revenue out of the poorest defendants who appear in their courts. These modern-day debtors’ prisons impose devastating human costs, waste taxpayer money and resources, undermine our criminal justice system, are racially skewed, and create a two-tiered system of justice.

This report seeks to describe the realities of today’s debtors’ prisons through the experiences of dozens of men and women from across the country who have been ensnared in the criminal justice system because they were too poor to manage their legal debts. This report also seeks to provide state and local governments and courts with a more sensible path, one where they no longer will be compelled to fund their criminal justice systems on the backs of the poor, and where the promise of equal protection under the law for the poor and affluent alike will finally be realized.

ENDNOTES

- 1 See *Bearden v. Georgia*, 461 U.S. 660, 662-63, 668-69 (1983).
- 2 THE SENTENCING PROJECT, *FACTS ABOUT PRISONS AND PRISONERS* (2009) (citing Bureau of Justice Statistics), available at <http://www.sentencingproject.org/doc/publications/inc.factsaboutprisons.pdf>.
- 3 U.S. CENSUS BUREAU, *POPULATION ESTIMATES PROGRAM* (2007).
- 4 *Farrakhan v. Gregoire*, 590 F.3d 989, 1010 (9th Cir. 2010), *reh'g granted*, 603 F.3d 1072 (9th Cir. 2010).
- 5 *Id.* at 1009-10.
- 6 Interview with Jon Wool, Vera Institute, Sept. 7, 2010. The figures were derived by combining the Bureau of Justice Statistics' midyear 2009 jail inmate data with the Census Bureau's July 2009 population estimates. See BUREAU OF JUSTICE STATISTICS, *JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES*, NCJ 230122, tables 1 & 9a (June 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>; U.S. CENSUS BUREAU, *ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2009, NST-EST2009-01*, available at <http://www.census.gov/popest/states/tables/NST-EST2009-01.xls>; U.S. CENSUS BUREAU, *ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR COUNTIES (LOUISIANA): APRIL 1, 2000 TO JULY 1, 2009*, available at <http://www.census.gov/popest/counties/tables/CO-EST2009-01-22.xls>. See also Barry Gerharz & Seung Hong, *Down by Law: Orleans Parish Prison Before and After Katrina*, DOLLARS AND SENSE, March/April 2006.
- 7 See *Ballard v. Wall*, 413 F.3d 510 (5th Cir. 2005).
- 8 *State v. Nelson*, 25 So. 3d 905 (La. App. 2d Cir. 2009) (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)); *State v. Monson*, 576 So.2d 517 (La. 1991); *State v. Kerrigan*, 671 So. 2d 1242 (La. App. 2d Cir. 1996). See also *State v. Gaar*, 746 So. 2d 41 (La. App. 2d Cir. 1999); *State v. Washington*, 533 So. 2d 392 (La. App. 4th Cir. 1988) (defendant may not be incarcerated for defaulting on court costs owed) (citing *State v. Holmes*, 516 So. 2d 184 (La. App. 4th Cir. 1987)).
- 9 *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989).
- 10 Interview with Derwyn Bunton and Jee Park, Jan. 12, 2010.
- 11 Interview with Sam Dalton, Apr. 14, 2010.
- 12 See R.S. 15:571.11(A)(1)(a); R.S. 13:1381.4(2).
- 13 Interview with Katherine Mattes, Mar. 19, 2010.
- 14 Interview with Derwyn Bunton, Apr. 27, 2010.
- 15 *Id.*
- 16 Interview with Pam Metzger, Mar. 19, 2010.
- 17 Interview with Derwyn Bunton, April 27, 2010.
- 18 *Id.*
- 19 U.S. CENSUS BUREAU, *ORLEANS PARISH QUICK FACTS* (2010), available at <http://quickfacts.census.gov/qfd/states/22/22071.html>.
- 20 See, e.g., ACLU NATIONAL PRISON PROJECT, *ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA*, 17 (Aug. 2006); THE BROOKINGS INSTITUTION, *NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE*, 6-7 (2005).
- 21 Docket, *State v. Matthews*, No. 474847 (Orleans Parish Magistrate Ct.).
- 22 Docket, *State v. Matthews*, No. 469932 (Orleans Parish Crim. Dist. Ct.).
- 23 Interview with Aaron Clark-Rizzio, Apr. 20, 2010.
- 24 Docket, *State v. Matthews*, No. 469932 (Orleans Parish Crim. Dist. Ct.).
- 25 Settlement Agreement, *Hamilton v. Morial*, No. 69-2443 (E.D. La. Mar. 26, 2003).
- 26 In addition to the \$22.39 per diem, the City has separately agreed to reimburse the Sheriff for inmate medical care and certain staffing costs. The Sheriff's 2010 budget anticipates \$3.2 million in reimbursements for medical costs and \$4 million in "on behalf payments" from the City, which include reimbursement for health insurance and other staffing-related costs. ORLEANS PARISH CRIMINAL SHERIFF'S OFFICE, *ANNUAL BUDGET REPORT FOR THE YEAR ENDED DECEMBER 31, 2010* (Oct. 9, 2009). If accurate, these figures mean that the per-person cost to the City of incarcerating additional debtors is considerably higher than the \$22.39 per diem payment.
- 27 Docket, *State v. Perrymon*, No. 498416 (Orleans Parish Magistrate Ct.).
- 28 Docket, *State v. Perrymon*, No. 484486 (Orleans Parish Crim. Dist. Ct.).

29 Interview with Aaron Clark-Rizzio, Apr. 20, 2010.
30 *Id.*
31 Docket, State v. Perrymon, No. 484486 (Orleans Parish Crim. Dist. Ct.).
32 Interview with Derwyn Bunton and Jee Park, Jan. 12, 2010.
33 Interview with Leroy Sorden, May 5, 2010; Docket, State v. Sorden, No. 481167 (Orleans Parish Crim. Dist. Ct.).
34 Docket, State v. Jones, No. 427767 (Orleans Parish Crim. Dist. Ct.).
35 Interview with Ariel Test, Apr. 20, 2010.
36 Docket, State v. Tobias, No. 451430 (Orleans Parish Crim. Dist. Ct.).
37 Interview with Derwyn Bunton, Apr. 27, 2010.
38 Interview with Gregory White, Apr. 20, 2010.
39 Docket, State v. White, No. 492943 (Orleans Parish Crim. Dist. Ct.).
40 Interview with Carlotta Lepingwell, Apr. 20, 2010.
41 *Id.* Docket, State v. White, No. 492943 (Orleans Parish Crim. Dist. Ct.).
42 Interview with Derwyn Bunton, Apr. 27, 2010.
43 Interview with municipal court personnel, Sept. 10, 2010.
44 Interview with Derwyn Bunton, Apr. 27, 2010.
45 Interview with Judge Calvin Johnson, Apr. 22, 2010.
46 *Id.*
47 *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972).
48 Complaint, *Dear v. Shea*, No. 2:07-cv-1186 (E.D. La. Mar. 6, 2007)
49 *Id.* at 1-2.
50 *Id.* at 2-6.
51 *Id.* at 1.
52 Press Release, ACLU of Louisiana, *ACLU Announces Favorable Settlement of Debtors' Prison Lawsuit* (Oct. 16, 2007) available at <http://www.laaclu.org/newsArchive.php?id=58#n58>.
53 Interview with Katherine Mattes, Apr. 28, 2010; Interview with Derwyn Bunton and Jee Park, Jan. 12, 2010.
54 These figures are based on the ACLU's review of records, including municipal court case chronology reports, during the indicated time periods.
55 Walter asked that we keep his identity confidential because of his fear of retaliation.
56 Interview with "Walter," May 20, 2010.
57 *Id.*
58 *Id.*; review of court records.
59 Interview with Pamela Metzger, Mar. 19, 2010.
60 Interview with Judge Calvin Johnson, Apr. 22, 2010.
61 Interview with Derwyn Bunton, Apr. 27, 2010.
62 *Id.*
63 Email from Rob Kazik, Judicial Administrator, Orleans Parish Criminal District Court (May 7, 2010).
64 Interview with Judge Calvin Johnson, Apr. 22, 2010.
65 *Id.*
66 Interview with Derwyn Bunton, April 27, 2010.
67 *Id.*
68 Interview with Judge Calvin Johnson, Apr. 22, 2010.
69 *Id.*
70 Interview with Sam Dalton, Apr. 14, 2010.

- 71 See AMERICAN BAR ASSOCIATION, *FUNDING THE JUSTICE SYSTEM: HOW ARE THE COURTS FUNDED?* 19-20 (May 2009), available at http://www.abanet.org/justice/pdf/Funding_the_Justice_System.pdf; CONFERENCE OF STATE COURT ADMINISTRATORS, *STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES* (June 1986), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=81> (Standards 4.1 and 4.2).
- 72 CONFERENCE OF STATE COURT ADMINISTRATORS, *POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS*, 14 (Dec. 2003), available at <http://cosca.ncsc.dni.us/WhitePapers/BudgetWhitePaper.pdf>.
- 73 Interview with Pamela Metzger, Mar. 19, 2010.
- 74 Interview with Derwyn Bunton, April 27, 2010.
- 75 *Id.*
- 76 Interview with Judge Calvin Johnson, Apr. 22, 2010.
- 77 Letter from Marjorie Esman, Executive Director, ACLU of Louisiana, to Marlin N. Gusman, Orleans County Criminal Sheriff, Apr. 16, 2010 (requesting “[d]ocuments showing the total number of prisoners at Orleans Parish Prison on April 1, 2010, and showing the total number of prisoners housed at Orleans Parish Prison on April 1, 2010 for failing to pay legal financial obligations related to their criminal conviction or sentence.”).
- 78 E-mail from Craig Frosch to Marjorie Esman, May 27, 2010; phone call from Marjorie Esman to Craig Frosch, May 27, 2010; phone call from Marjorie Esman to Craig Frosch, May 28, 2010. According to the Sheriff, the prison does not maintain a list of prisoners that includes charging or sentencing information, so it cannot identify the total number of prisoners held for any particular offense or offenses.
- 79 POSTLETHWAITE & NETTERVILLE, *ANNUAL FINANCIAL REPORT: ORLEANS PARISH CRIMINAL SHERIFF’S OFFICE, NEW ORLEANS, LA., FOR THE YEAR ENDED DECEMBER 31, 2009*, Ex. E (July 21, 2010), available at [http://app1.lta.state.la.us/PublicReports.nsf/9EAD60315C694F7986257766005A6CC8/\\$FILE/00017CCF.pdf](http://app1.lta.state.la.us/PublicReports.nsf/9EAD60315C694F7986257766005A6CC8/$FILE/00017CCF.pdf).
- 80 Interview with Judge Calvin Johnson, Apr. 22, 2010.
- 81 Interview with Derwyn Bunton, Apr. 27, 2010.
- 82 See CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 71 (setting forth in Standard 4.1 that “Neither courts nor specific court functions should be expected to operate from proceeds produced by fees and miscellaneous charges. Courts should receive adequate financial funding from governmental sources to enable them to fully carry out their constitutional mandates,” and in Standard 4.2 that “The proceeds of any fee should not be earmarked for the benefit of any judge, court official, or other criminal justice official who may have direct or indirect control over cases filed or disposed in the judicial system.”).
- 83 Mich. Const. art. I, § 21.
- 84 In 2000, almost 25% of the African American population in Michigan lived below the poverty line. U.S. CENSUS BUREAU, *MICHIGAN, CENSUS 2000 DEMOGRAPHIC PROFILE HIGHLIGHTS FOR AFRICAN AMERICANS*.
- 85 Although African Americans constitute only 14% of Michigan’s population (and other non-whites are less than 5% of the population), 50% of those incarcerated in Michigan are non-white. U.S. CENSUS BUREAU, *STATE AND COUNTY QUICK FACTS, MICHIGAN* (2009); MICHIGAN DEPARTMENT OF CORRECTIONS, *STATISTICAL REPORT*, at B-4 (2009), available at http://www.michigan.gov/documents/corrections/2009_MDOC_STATISTICAL_REPORT_319907_7.pdf.
- 86 Interviews with Kawana Young, May 28, 2010; August 25, 2010.
- 87 Mich. Comp. Laws §§ 769.1a; 769.1k; 780.905.
- 88 Mich. Comp. Laws § 769.1f (“[A] person shall not be imprisoned, jailed, or incarcerated for a violation of parole or probation, or otherwise, for failure to make a reimbursement as ordered under this section unless the court determines that the person has the resources to pay the ordered reimbursement and has not made a good faith effort to do so.”).
- 89 Mich. Comp. Laws § 600.4803.
- 90 Interview with Patricia Slomski, May 17, 2010.
- 91 Mich. Comp. Laws §§ 801.4b; 801.83.
- 92 Interview with Sister Marietta Fritz, June 8, 2010.
- 93 The only “work-off” statute is one authorizing civil contempt for a willful refusal to pay civil fines, costs, and fees, with incarceration at a credit of \$30 a day. See Mich. Comp. Laws §§ 600.8729, 600.8829. See also Mich. Comp. Laws § 257.908.
- 94 Interviews with Walter and Jane Riepen, Feb. 17, 2010; Mar. 22, 2010.
- 95 *Id.*
- 96 Mich. Comp. Laws §§ 769.1k; 769.3(1).
- 97 Mich. Comp. Laws § 771.3.
- 98 Mich. Court R. 1.110.

- 99 *People v. Jackson*, 769 N.W.2d 630, 642 (Mich. 2009).
- 100 *Id.* at 639.
- 101 Interview with Regina Roberts, May 28, 2010; *State v. Roberts*, No. 06-09664-FH (17th Cir. Ct. for Cty. of Kent, Mich.).
- 102 *People v. Likine*, No. 290218 (Mich. Ct. App. June 8, 2010); Brief for Appellant, *Likine*, No. 290218.
- 103 Re-Sentencing Transcript, *People v. Kalman*, No. 04-11241 FH (39th Judicial Cir. Ct. for Cty. of Lenawee, Mich.) (Sep. 15, 2005).
- 104 *People v. Dunbar*, 690 N.W.2d 476, 486 (Mich. Ct. App. 2004) (internal quotation marks omitted). *People v. Jackson*, 769 N.W.2d 630 (Mich. 2009), further referred courts to Mich. Court R. 6.005 (B), which details the factors a court must assess in deciding whether a defendant is indigent, including “present employment, earning capacity and living expenses,” “outstanding debts and liabilities,” “public assistance,” and other similar considerations. Mich. Court R. 6.005(B). *Jackson* noted that “[w]hile these factors might be an adequate gauge of the indigence of a parolee or probationer, they are largely irrelevant in relation to imprisoned individuals.” *Jackson*, 769 N.W.2d at 643. The court noted that it may adopt relevant guidelines soon, but “[i]n the meantime, trial courts should focus on whether the defendant’s indigence has ended and whether payment at the level ordered would cause manifest hardship.” *Id.*
- 105 *Jackson*, 769 N.W.2d at 635 (quoting *Bearden v. Georgia*, 461 U.S. 660, 672 (1983)).
- 106 Interview with Anne Yantus, Feb. 5, 2010.
- 107 See SCAO COURT COLLECTIONS PROGRAM COMPONENTS AND DETAILS, available at <http://courts.michigan.gov/scao/services/collections/collections.htm>.
- 108 Mich. Comp. Laws § 771.5(1) provides that probation may be extended “as the circumstances require, so long as the maximum probation period is not exceeded.”
- 109 See Brief in Support of Nowlin’s Motion for Relief from Supplemental Order of March 3, 2009, *In re: V.L. Nowlin*, No. 07-DL-0258 (47th Cir. Ct. for Cty. of Delta Cty., Mich.). See also Editorial, *The New Debtors’ Prisons*, N.Y. TIMES, Apr. 6, 2009, at A24.
- 110 Interview with Jennifer Fiess, June 2, 2010.
- 111 Stephen Heyza’s Brief on Appeal, *State v. Heyza*, No. 296313 (Mich. Ct. App. 2010).
- 112 Interview with James Maceroni, Feb. 16, 2010.
- 113 Interview with Anne Yantus, Feb. 5, 2010.
- 114 Interview with James Maceroni, Feb. 16, 2010.
- 115 Interview with Anne Yantus, Feb. 5, 2010.
- 116 COURT COLLECTIONS ADVISORY COMMITTEE, MICHIGAN SUPREME COURT, FINAL REPORT (July 2009), available at <http://courts.michigan.gov/scao/services/collections/07-09FinalReport.pdf>
- 117 See Administrative Order No. 2010-1; ADM File No. 2005-13.
- 118 See SCAO COURT COLLECTIONS PROGRAM COMPONENTS AND DETAILS, *supra* note 107.
- 119 SCAO TRIAL COURT COLLECTIONS STANDARDS (July 2007), available at http://courts.michigan.gov/scao/resources/standards/cl_stds.pdf.
- 120 ISABELLA COUNTY TRIAL COURT COLLECTIONS POLICY, available at <http://courts.michigan.gov/scao/services/collections/Policies/SampleCourtPolicies/TrialCourtCollectionPolicy.pdf>.
- 121 Letter from Michelle D. Hill, Court Administrator of the 10th District Court in Calhoun County to Court Employees (Feb. 10, 2009), available at <http://courts.michigan.gov/scao/services/collections/BestPractices/D10-021009LetterToEmployees.pdf>.
- 122 37th Judicial Circuit of Michigan Directive, re: Non-Restitution Criminal Case Financial Assessments (Jan. 2, 2009), available at <http://courts.michigan.gov/scao/services/collections/Policies/SampleCourtPolicies/AbilityToPay.pdf>.
- 123 That amount includes a \$100 penal fine, 50% of the fees due to counsel, general court costs of \$440, state minimum costs of \$60 per count, and a Crime Victims Rights Assessment of \$60.
- 124 SCAO, BEST PRACTICES AND PILOT PROGRAMS (Jan. 2007), available at <http://courts.michigan.gov/scao/services/collections/BestPractices.htm>.
- 125 Communication with Melody Wallace, Litigation Director of MDOC, Feb. 11, 2010, Feb. 17, 2010 (on file with the ACLU).
- 126 Email Correspondence from Katha Moye of SCAO, April 5, 2010 (on file with the ACLU).
- 127 Email Correspondence from Marcia McBrien of SCAO, May 21, 2010 (on file with the ACLU).
- 128 PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS: MICHIGAN FACT SHEET (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Fact_Sheets/PSPP_1in31_factsheet_ML.pdf.

- 129 Ohio Const. art. I, § 15.
- 130 Ohio law allows mayors of municipal corporations populated by more than 100 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).
- 131 A municipal court is the trial-level court for misdemeanors, traffic cases, and civil actions up to \$15,000. See Ohio Rev. Code § 1901.01 et seq.
- 132 Ohio Rev. Code § 2947.14.
- 133 *Id.*
- 134 State v. Self, 2005 Ohio 1120, 2005 WL 589887 (Ohio Ct. App. Mar. 14, 2005) (holding that fines and fees have to be assessed separately for that reason).
- 135 *Id.*; see also Ex Parte Wilson, 183 N.E.2d 625, 625 (Ohio Ct. App. 1962) (holding that the State cannot imprison an indigent defendant for failure to pay fees for court-appointed counsel because “such debt is a civil debt”).
- 136 Ohio Rev. Code §§ 2929.18(D); 2929.28(D).
- 137 State v. Myers, Nos. 6-03-02, 6-03-03, 2003 WL 21537388 (Ohio Ct. App. July 8, 2003) (holding that imprisonment for contempt for failure to pay costs—a civil obligation—violates the Ohio Constitution); State v. Swift, 2005 Ohio 1595, 2005 WL 742496 (Ohio Ct. App. Apr. 1, 2005) (holding that indigent defendants may not be incarcerated for their inability to pay either fines or costs); In re Buffington, 89 Ohio App. 3d 814 (1993) (holding that courts cannot use contempt proceedings to collect costs).
- 138 See City of Strongsville v. Waiwood, 62 Ohio App. 3d 521, 526-27 (1989) (holding that because a municipal court has no statutory authority to hold a hearing on a defendant’s failure to pay costs, it had no right to issue an arrest warrant for a defendant’s failure to appear at that hearing).
- 139 Interview with Tim Young, Ohio State Public Defender, Feb. 22, 2010.
- 140 In Ohio, people of color account for 47% of all correctional commitments, although they constitute 16% of Ohio’s population. See OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, COMMITMENT REPORT 3 (FY 2009), available at <http://www.drc.ohio.gov/web/reports/Commitment/Fiscal%20Year%202009%20Commitment%20Report.pdf>; OHIO DEPARTMENT OF DEVELOPMENT, OHIO’S POPULATION (2009), available at <http://www.development.ohio.gov/research/files/p0006.pdf>.
- 141 Thirty percent of African Americans in Ohio live below the poverty line. OHIO DEPARTMENT OF DEVELOPMENT, OHIO AFRICAN AMERICANS (2009), available at <http://www.development.ohio.gov/research/files/p0008.pdf>.
- 142 State v. Scott, 452 N.E. 2d 517, 519 (Ohio 1982) (“It violates the Equal Protection Clause to revoke someone’s probation simply because he is too poor to pay the costs of prosecution.”).
- 143 Strattman v. Studt, 253 N.E.2d 749, 753 (Ohio 1969).
- 144 *Id.* (“[A] government . . . cannot require confinement to work off court costs;” it may only collect by those methods provided for in civil judgments).
- 145 Ohio Rev. Code § 2947.23(A)(1). A judge may order a defendant to perform community service for no more than forty hours per month, if the judge warned the defendant at sentencing that failure to pay costs and fees could result in community service. At least one Ohio Court of Appeals held that a judge cannot order indigent defendants to perform community service to pay off costs on the ground that costs are a civil debt. See State v. Glasscock, 632 N.E.2d 1328, 1330 (Ohio Ct. App. 1993) (prohibiting trial courts from ordering offenders to perform community service to pay court costs, i.e., civil debts, but allowing such orders to pay off criminal fines). A judge also may not convert fines to community service after sentencing and then jail the defendant for failing to work off the fine. See State v. Ellis, 2008 Ohio 2719, ¶ 21, 2008 WL 2313211 (Ohio Ct. App. 2008).
- 146 State v. Lamb, 837 N.E.2d 833, 838 (Ohio Ct. App. 2005).
- 147 Docket entry, City of Xenia v. Webb, No. 99 CRB 03055-1-2 (Xenia Mun. Ct, Greene Cty., Ohio, Dec. 7, 2000).
- 148 Docket entry, City of Xenia v. Webb, No. 99 TRD 09784-1-1 (Xenia Mun. Ct, Greene Cty., Ohio, Aug. 9, 2006).
- 149 Transcript of Proceedings at 5, State v. Webb, No. 04TRD10910 (Xenia Mun. Ct, Greene Cty., Ohio, Aug. 1, 2006).
- 150 In re Complaint Against Susan L. Goldie, No. 07-102, (Bd. of Comm’rs on Grievance and Discipline of the Supreme Ct. of Ohio 2008).
- 151 Ohio State Bar Assn. v. Goldie, 894 N.E.2d 1226 (Ohio 2008).
- 152 Interview with Tim Young, Ohio State Public Defender, Feb. 22, 2010. See also Yolanda Twitty’s Motion to Credit Time Served and to Vacate Status Hearing, No. 05-CRB-1794, State v. Twitty (Area One Court of Montgomery Cty., Ohio, August 2008).

- 153 OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ANNUAL REPORT 19 (2009), available at <http://www.drc.ohio.gov/web/Reports/Annual/Annual%20Report%202009.pdf>.
- 154 Research conducted by ACLU of Ohio, July 29, 2010.
- 155 Andrew Welsh-Huggins, *Study Finds Ohio Probation System Fragmented*, ASSOCIATED PRESS, July 26, 2010.
- 156 Interview with Kay Locke, July 26, 2010.
- 157 Interview with Aaron Herron, Aug. 17, 2010.
- 158 Audio Transcript, *Mansfield v. Merriweather*, No. 2009CRB02816 (Mansfield Mun. Ct., Richland Cty., Ohio Sep. 3, 2009); Docket for *Mansfield v. Merriweather*, No. 2005CRB05128 (Mansfield Mun. Ct., Richland Cty., Ohio); Docket for *Mansfield v. Merriweather*, No. 2005TRD10069 (Mansfield Mun. Ct., Richland Cty., Ohio); Docket for *Mansfield v. Merriweather*, No. 2008CRB0351 (Mansfield Mun. Ct., Richland Cty., Ohio); Docket for *Mansfield v. Merriweather*, No. 2009CRB02816 (Mansfield Mun. Ct., Richland Cty., Ohio); Arrestee Search Information Record, Richland County Sheriff's Office, Sep. 7, 2010 (on file with the ACLU).
- 159 Interview with Richland County attorney, June 22, 2010.
- 160 Letter from Glen H. Dewar, Public Defender, to Judges of the Dayton Municipal Court (Dec. 21, 2001) (on file with the ACLU).
- 161 Letter from Glen H. Dewar, Public Defender, to Judges of the Dayton Municipal Court (Aug. 2, 2002) (on file with the ACLU).
- 162 See *supra* notes 134, 135, 137, and 138.
- 163 Glen H. Dewar correspondence to the ACLU, April 4, 5 and 6, 2010; Aug. 26, 2010.
- 164 Interview with Tim Young, Ohio State Public Defender, Feb. 22, 2010.
- 165 *Id.*
- 166 Glen H. Dewar correspondence, Apr. 4, 5 and 6, 2010; Aug. 26, 2010.
- 167 Eaton Municipal Court, Ohio, Violation Bureau Fine Schedule, <http://www.eatonmunicipalcourt.com/fees.htm>.
- 168 Hamilton County, Ohio, How to Pay Fines, <http://www.hamilton-co.org/municipalcourt/pay.htm#stay>.
- 169 Interview with Bob Newman, Feb. 8, 2010.
- 170 "Ty's" name has been changed at the request of his attorney.
- 171 Interview with "Ty's" Public Defender, May 13, 2010; Memorandum of Law in support of Defendant's case (on file with the ACLU; identifying information omitted).
- 172 *Small Ohio Towns Use Mayor's Court for Big Revenue*, THE NEWSPAPER.COM (July 27, 2005), available at <http://www.thenewspaper.com/news/05/558.asp>.
- 173 Interview with David Singleton, Feb. 22, 2010.
- 174 Kelly Lecker, *Ohio Mayor's Courts Do Fine*, TOLEDO BLADE (July 20, 2003). The mayor's courts law, Ohio Rev. Code § 1905.01, was amended in 2003 to allow only municipalities of more than 100 people to establish mayor's courts. Sub. H.B. 24, 125th Gen. Assem. (OH. 2003).
- 175 *Small Ohio Towns Use Mayor's Court for Big Revenue*, *supra* note 172.
- 176 Ohio Rev. Code § 1901.
- 177 See *Middleburg Hts. v. Quinones*, 900 N.E.2d 1005, 1006-07, 1009 (Ohio 2008).
- 178 Interview with Robert Tobik, Feb. 17, 2010.
- 179 Ohio Rev. Code § 2929.37.
- 180 *Id.*
- 181 *Allen v. Leis*, 213 F. Supp. 2d 819 (S.D. Ohio 2002).
- 182 Sheila McLaughlin, *Pay-to-Stay Mantra Nixed for Jails*, CINCINNATI.COM (Feb. 13, 2010).
- 183 Erica Blake, *Regional Jail Starting Pay-to-Stay*, TOLEDO BLADE (Aug. 3, 2009).
- 184 McLaughlin, *supra* note 182.
- 185 Ga. Const. Art. 1, § 1, ¶ 23. See *Messenger v. State*, 72 S.E.2d 460, 461 (1952) (interpreting this provision broadly to apply to "any and all imprisonment for debt, irrespective of the period of its duration or the means whereby it is accomplished").
- 186 Ga. Code Ann. § 17-11-1 ("The costs of a prosecution, except the fees of his own witnesses, shall not be demanded of a defendant until after trial and conviction. If convicted, judgment may be entered against the defendant for all costs accruing in the committing and trial courts and by any officer pending the prosecution.").
- 187 Ga. Code Ann. § 42-8-34(d)(1).

- 188 See, e.g., *State v. Higgins*, 326 S.E.2d 728, 730 (Ga. 1985) (unanimously invalidating an income tax law that authorized punishment solely for the nonpayment of income taxes). Justice Weltner’s concurrence explained that the invalidated law’s flaw was its expansive language, which made it a crime to fail to pay income taxes *for any reason*, meaning that even true indigents without the means to pay taxes could be prosecuted under the law. *Id.* at 730 (Weltner, J., concurring). According to Justice Weltner, “[a] criminal provision drawn in terms of a ‘wilful failure’ to pay tax would be an entirely different matter, as it would catch the intentional tax evader without at the same time ensnaring the hapless pauper.” *Id.*
- 189 Compare *Blalock v. Blalock*, 105 S.E.2d 721, 723 (Ga. 1958) (“It was an abuse of discretion to require the defendant to pay the entire amount where the evidence discloses he was unable to comply, and amounts to imprisonment for debt.”) with *Kaufmann v. Kaufmann*, 271 S.E.2d 175, 176 (Ga. 1980) (finding the sanction of civil contempt is constitutionally permissible where the debtor is able to “purge” himself of contempt by acting in accordance with a court order); *Ensley v. Ensley*, 238 S.E.2d 920 (Ga. 1977) (finding constitutionally permissible the unconditional imprisonment for criminal contempt of an alimony debtor).
- 190 Sandy Hodson, *Critics say private probation punishes poor unfairly*, AUGUSTA CHRONICLE, Nov. 15, 2009, available at http://chronicle.augusta.com/stories/2009/11/15/met_555844.shtml.
- 191 Interview with Sarah Geraghty, Southern Center for Human Rights, Mar. 16, 2010.
- 192 U.S. CENSUS BUREAU, GEORGIA MAPSTATS 2007, available at <http://www.fedstats.gov/qf/states/13000.html>. Latinos make up 8% and whites make up 58% of the population. *Id.*
- 193 MARC MAUER AND RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 6 (July 2007), available at http://sentencingproject.org/detail/publication.cfm?publication_id=167.
- 194 The HENRY J. KAISER FAMILY FOUNDATION, STATE HEALTH FACTS, GEORGIA: POVERTY RATE BY RACE/ETHNICITY (2007-2008), available at <http://www.statehealthfacts.org/profileind.jsp?rgn=12&ind=14&cat=1>.
- 195 See Mariano Castillo, *Childless man freed after serving time for child support violations*, CNN.COM, July 16, 2009, <http://www.cnn.com/2009/CRIME/07/15/georgia.child.support/index.html>.
- 196 *Id.*
- 197 See Carlos Campos, *Poverty Keeps Woman Jailed*, ATLANTA JOURNAL CONST., Sept. 19, 2006, available at <http://www.schr.org/articles/hurley>; Petition for a Writ of Habeas Corpus, *Hurley v. Hinton*, No. HC00532 (Sup. Ct of Fulton County, Ga. 2006), available at http://www.schr.org/files/hurley_habeas.pdf.
- 198 Campos, *supra* note 197; Associated Press, *Agreement Frees Woman Who Remained Jailed Over Fine*, Sept. 20, 2006, available at <https://www.accessnorthga.com/detail.php?n=116711&c=8>.
- 199 See Compl. at ¶¶ 5-6, 12-20, *Williams v. Clinch County*, No. 7:04-CV-124-HL (M.D. Ga. 2005), available at http://www.schr.org/files/clinch_complaint.pdf; Pltf. Motion for Summary Judgment, *Williams*, No. 7:04-CV-124-HL, available at http://www.schr.org/files/clinch_summary.pdf.
- 200 Compl. at ¶ 1, *Williams*, No. 7:04-CV-124-HL.
- 201 Greg Bluestein, *South Georgia County to Repay Inmates Saddled with ‘Jail Bills’*, ASSOCIATED PRESS, April 8, 2006, <http://www.schr.org/node/119>.
- 202 The names have been changed upon request.
- 203 Correspondence with “Mary,” Aug. 25, 26, 27, 2010.
- 204 See SOUTHERN CENTER FOR HUMAN RIGHTS, PROFITING FROM THE POOR: A REPORT ON PREDATORY PROBATION COMPANIES IN GEORGIA (July 2008), available at http://www.schr.org/files/profit_from_poor.pdf.
- 205 David M. Reutter, *Georgia’s Privatized Probation System Traps the Poor*, PRISON LEGAL NEWS, June 2010, at 22.
- 206 Hodson, *supra* note 190; see also Reutter, *supra* note 205.
- 207 Reutter, *supra* note 205.
- 208 Hodson, *supra* note 190.
- 209 Sandy Hodson, *Judge rules hearing, jail sentence unlawful*, THE AUGUSTA CHRONICLE, Jan. 28, 2010, available at <http://chronicle.augusta.com/news/crime-courts/2010-01-28/judge-rules-hearing-jail-sentence-unlawful>.
- 210 Reutter, *supra* note 205.
- 211 *McGee v. Sentinel Offender Servs.*, No. 1:10-cv-00054-JRH-WLB (S.D. Ga.).
- 212 Hodson, *supra* note 190.
- 213 Brief of *Amicus Curiae* the Southern Center for Human Rights at 14-15, *Harrelson v. Jones et al.*, No. S09X1626 (Ga. Sept. 24, 2009), available at http://www.schr.org/files/post/Harrelson_amicus.pdf.
- 214 Hodson, *supra* note 190.

215 Reutter, *supra* note 205.

216 Interview with Marietta Conner, May 2010; Correspondence with Sarah Geraghty, Sep. 8, 2010.

217 Ga. Ann. Code § 15-21A-6(c).

218 SCHR Amicus Brief, *Harrelson v. Jones*, *supra* note 213.

219 *Id.*

220 *Id.*

221 *Id.* at 9-11.

222 *Id.* at 16-18.

223 *Id.* at 16-17.

224 *Id.* at 19-20.

225 *Id.* at 21.

226 *Sentinel Offender Services, LLC v. Harrelson*, 690 S.E.2d 831, 834 (Ga. 2010).

227 Nick Cenegy, *Some Groups Weary of Privatizing Probation*, THE ANNISTON STAR, Feb. 25, 2009, 2009 WLNR 3642028.

228 *Coalition offers testimony regarding treatment by Middle Georgia Probation*, AMERICUS TIMES RECORDER (GA.), July 17, 2008, 2008 WLNR 13380347.

229 Ga. Code Ann. § 42-8-106 (“[A]ll reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation . . . are declared to be confidential.”). See also Beth Alston, *Requests made for rezoning of new PSMC property*, AMERICUS TIMES RECORDER (GA.), June 12, 2009, 2009 WLNR 11307992.

230 Celia Perry, *Probation for profit: in Georgia’s outsourced justice system, a traffic ticket can land you deep in the hole*, MOTHER JONES (July-August 2008). See also *Coalition*, *supra* note 228.

231 See, e.g., John Schwartz, *Pinched Courts Push to Collect Fees and Fines*, N.Y. TIMES, April 6, 2009, available at <http://www.nytimes.com/2009/04/07/us/07collection.html>.

232 H.B. 779, 2007-2008 Legis. Sess., Gen. Assem. (Ga. 2007).

233 SCHR, *Profiting from the poor*, *supra* note 204, at 10.

234 This section of the report was authored by Alexis Harris, Ph.D., assistant professor, Department of Sociology, University of Washington

235 RCW 9.94A.760.

236 RCW 9.94A.634(3)(c).

237 RCW 9.94A.634(3)(c) and (3)(d); *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d. 166 (1992).

238 *State v. Bower*, 64 Wn. App. 227, 231-32, 823 P.2d 1171, *rev. denied*, 119 Wn.2d 1011 (1992).

239 *U.S. v. Dubose*, 146 F.3d 1141, 1147 (9th Cir. 1998) (citing *Bearden v. Georgia*, 461 U.S. 660, 674 (1983)).

240 *U.S. v. Estrada Castillo*, 549 F.2d 583, 584-85 (9th Cir. 1976) (citing *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970)).

241 See Part II, *infra*.

242 Brief of Amici Curiae American Civil Liberties Union of Washington and Washington Association of Criminal Defense Lawyers at 2-3, *State v. Nason*, No. 82333-2 (Wash. 2010).

243 *Id.* at 5, 7 (“Washington law . . . follows *Bearden* in requiring the court to find that a defendant’s failure to pay a fine is intentional before remedial sanctions may be imposed.”) (quoting *Smith v. Whatcom County District Court*, 147 Wn. 2d 98, 112, 52 P.3d 485 (2002)).

244 *Id.* at 9.

245 *State v. Nason*, 233 P.3d 848 (Wash. 2010).

246 Brief of Appellant at 6, *State v. Nash*, No. 38514-7-II (Wash. Ct. App. 2009).

247 *Id.* at 8.

248 In 2010, the Washington Legislature passed a bill requiring consideration of a defendant’s mental condition before imposing LFOs. HB 3076 (Wash. 2010), 61st Legis., 2010 Reg. Sess., Wash. Laws, c. 280 (2010).

249 Brief of Appellant at 11, *State v. Nash*, No. 38514-7-II (Wash. Ct. App. 2009).

250 *Id.* at 12.

251 *Id.* at 14.

252 Because N.S.T. is a juvenile, she is referred to by her initials in all court papers.

253 *State v. N.S.T.*, 232 P.3d 584, 586 (Wash. Ct. App. 2010).

254 *Id.*

255 *Id.*

256 *Id.*

257 Interview with Vanessa Lee, The Washington Appellate Project, Aug. 4, 2010.

258 *N.S.T.*, 232 P.3d at 590.

259 See *Bearden v. Georgia*, 461 U.S. 660, 674 (1983); *U.S. v. Parks*, 89 F.3d 570, 573 (9th Cir. 1996).

260 *N.S.T.*, 232 P.3d at 590.

261 BECKETT, K, HARRIS, A., EVANS, H., THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, REPORT PREPARED FOR THE WASHINGTON STATE MINORITY AND JUSTICE COMMISSION (2008) (hereinafter "Minority Commission Report").

262 *Farrakhan v. Gregoire*, 590 F.3d 989, 1010 (9th Cir. 2010), *reh'g granted*, 603 F.3d 1072 (9th Cir. 2010).

263 *Id.* at 1009-10.

264 *Id.*

265 Minority Commission Report, *supra* note 261, at 2-3.

266 *Id.* at 94.

267 *Id.* at 32

268 *Id.* at 4.

269 *Id.* at 21.

270 The median LFO was \$1,110. Minority Commission Report, *supra* note 261, at 22

271 *Id.*

272 *Id.*

273 The Minority Commission found that 51.2% of the persons whom it interviewed for its 2008 study had incomes that fell below the poverty line. Minority Commission Report, *supra* note 261, at 36.

274 *Id.* at 42.

275 Interview with "Reuben," Feb. 16, 2010.

276 Interview with "Kathie," Feb. 22, 2010.

277 SSB 5168 (Wash. 2004), 58th Legis., 2004 Reg. Sess., Wash. Laws, c. 121 (2004) (amending RCW 10.82.90(2)). A judge may reduce or waive interest on LFOs "as an incentive for the offender to meet his or her legal financial obligations" and if the offender has shown that he or she has "personally made a good faith effort to pay, that the interest accrual is causing a significant hardship, and that he or she will be unable to pay the principal and interest in full". A "good faith effort" is defined as a payment of the principal in full or for twenty-four consecutive monthly payments (not including payments DOC automatically garnishes from paychecks). The court may not waive interest on the restitution portion of the LFO and may only reduce it if the principal of the restitution has been paid in full.

278 Interview with "Nick," Feb. 16, 2010.

279 This information is based on King County Jail costs. Information obtained through a phone conversation with Metropolitan King County Councilmember Larry Gossett.

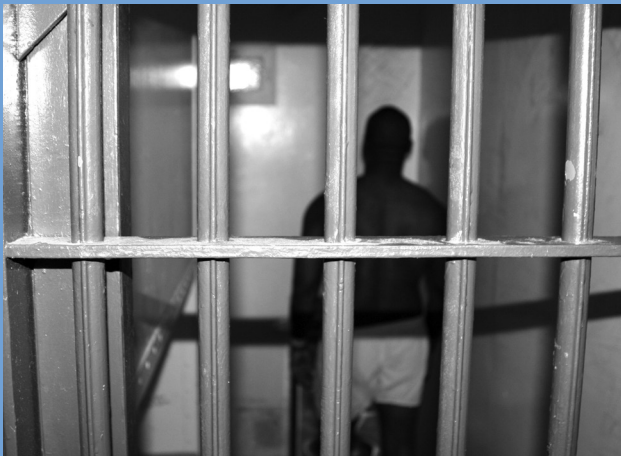
280 Interview with "Reuben," Feb. 16, 2010.

281 Once inmates complete their prison sentences and are under DOC supervision they may be charged a monthly fee for the cost of supervision (not less than \$10 and no more than \$50) (RCW 9.94A.780) and incarceration costs (\$50 per day spent incarcerated) (RCW 9.94A.760).

282 Interview with "Reuben," Feb. 16, 2010.

283 Interview with "Lisa," Mar. 22, 2010.

284 HB 1517 (Wash. 2009), 61st Legis., 2009 Reg. Sess., Wash. Laws, c. 325 (2009).



IN FOR A PENNY

The Rise of America's New Debtors' Prisons

A report by the
American Civil Liberties Union

OCTOBER 2010

The term “debtors’ prison” evokes for many a dark chapter in America’s distant past. The sad truth is that debtors’ prisons are flourishing today, more than two decades after the Supreme Court prohibited imprisoning those who are too poor to pay their legal debts. In this era of shrinking budgets, state and local governments have turned aggressively to using the threat and reality of imprisonment to squeeze revenue out of the poorest defendants who appear in their courts. These modern-day debtors’ prisons impose devastating human costs, waste taxpayer money and resources, undermine our criminal justice system, are racially skewed, and create a two-tiered system of justice.

This report seeks to describe the realities of today’s debtors’ prisons through the experiences of dozens of men and women from across the country who have been ensnared in the criminal justice system because they were too poor to manage their legal debts. This report also seeks to provide state and local governments and courts with a more sensible path, one where they no longer will be compelled to fund their criminal justice systems on the backs of the poor, and where the promise of equal protection under the law for the poor and affluent alike will finally be realized.

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