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INTRODUCTION

It is past time to rethink America's criminal justice system. The deaths of George Floyd, Breonna Taylor, and countless others, and the events that took place in Ferguson, Missouri, have exposed a system in which poor people and people of color suffer repeated interactions with the police that are disrespectful, unwarranted, and sometimes violent. These same individuals are disproportionately charged and prosecuted and routinely face excessive fines and penalties. At best, this so-called criminal justice system is unjust; at worst it is both shameful and scandalous.

These police interactions are not accidental, however, but the product of a deliberate strategy by government officials. Many municipalities have chosen to use the criminal justice system as a revenue-extracting tool. Offenses, even minor ones, produce fines and court fees that are used to fund municipal government removing the need to raise the taxes of those who might object to paying. [1] In many

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1. *See* CRIM. JUST. POL'Y PROGRAM, HARVARD L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT, A GUIDE FOR POLICY REFORM 12 (2016), https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-3.pdf; Larry Schwartztol, *The*

cases, as in the Ferguson, Missouri example we discuss below, this revenue-generation strategy becomes the chief driver of a government's criminal justice priorities.

The result is an interaction between law enforcement and citizens that appears essentially predatory: Officers are tasked with finding (or generating) violations and issuing citations, after which courts and clerks assess a seemingly endless array of fees, fines and costs whose chief purpose is the fattening of government coffers.[2] Meanwhile citizens are jailed, arrested, and bankrupted. They lose jobs, licenses, opportunities, and liberty.

This was the dire situation that Tianja Lanxter faced when she came to our law school's legal clinic. As a result of life-long abuse and addiction issues, Ti (the name she prefers), had served a prison sentence in the Tennessee Prison for Women for a crime committed years earlier. In 2013, she was released on parole and determined to change the direction of her life. Ti entered the Magdalene Program, a residential recovery program for women who have survived lives of violence and addiction.[3] In addition to the community of support, Magdalene participants receive educational support, job training, addiction counseling, and a pathway to productive lives free from addiction and criminal activity.[4] At Magdalene, Ti excelled, completing her GED, graduating from Magdalene, and then going to work for Thistle Farms, the nonprofit business whose healing products are made and marketed by the residents of Magdalene. At Thistle Farms, again, Ti excelled, becoming a manager and traveling around the country to promote the recovery program and to tell her personal story of recovery. On her modest salary, Ti bought a used car, rented an apartment, and secured car, rental, and health insurance, while regularly paying all parole fees owed.

What brought Ti to the UT Legal Clinic was a letter from the court clerk of the Knox County General Sessions Court informing Ti that the court intended to pursue Ti for unpaid court costs, jail fees, and fines, imposed for low-level traffic offenses, dating from 1998–2008.

Role of Courts in Eliminating the Racial Impact of Criminal Justice Debt, *in* THE NATIONAL CENTER FOR STATE COURTS' 2017 REPORT ON TRENDS IN STATE COURTS: FINES, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES 15–16 (Deborah W. Smith et al. eds., 2017), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/784.

2. *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 11–14; Schwartztol, *supra* note 1, at 15–16.

3. *See* Melinda Clark, *Magdalene and Thistle Farms Offer Prostitutes a Chance for Regrowth*, HUFFINGTON POST (Apr. 26, 2011, 9:31 PM), https://www.huffpost.com/entry/magdalene-and-thistle-farms_n_854130.

4. *See id.*

The total amount owed was less than $3,200, but out of reach given Ti's income and financial obligations. The problem Ti faced was much more than the taint of indebtedness, it was the loss of all she had worked to achieve. Because Tennessee suspended the driving privileges of those with unpaid court costs, even if Ti was able to avoid being jailed for failure to pay the amounts, she faced the very real possibility of losing her car, her job, and her home.[5]

Ti's story is real but not at all unique. Thousands of individuals have suffered a loss of liberty and opportunity by virtue of draconian laws that ultimately punish people for their poverty.[6]

Worse yet, judicial supervision in these cases is essentially missing in action, as the courts are not umpires, but rather participants, in this process, benefiting from the revenues that the system extracts. Instead of controlling the system, the courts are compromised by it. Moreover, the system is not racially neutral. A common factor in cities that rely on hefty fines, fees, and court costs as a mechanism of funding the courts is a large African-American population.[7] What the Justice Department found to be true in Ferguson, Missouri,[8] is true throughout the country. "Among the fifty cities with the highest proportion of revenues from fines, the median size of African American population—on a percentage basis—is more than five times greater than the national median."[9] The disproportionate concentration in communities of color results not only in an increase in incarceration rates for African Americans but also in a community-wide increase in the racial wealth gap.[10] The impact of this increase in the racial wealth gap often persists long after the citizen's encounter with the police has ended.[11]

The current system of fee-based criminal justice as it prevails in many communities is both unfair and discriminatory. It is also

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5. All court documents from the *State v. Lanxter* case in which we asked the court to forgive Ti's costs and fees are on file in the author's office and with the General Sessions Court for Knox County, Tennessee.

6. *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 11–14.

7. *See id.* at 14.

8. The Ferguson report found that African-Americans were more likely than Whites to be stopped, more likely to be issued multiple citations, and more likely to be cited when the officer had discretion. U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 64–69 (2015) [hereinafter DOJ REPORT], https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf; *see also* Consent Decree, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo., Mar. 17, 2016).

9. Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/.

10. *See* Schwartztol, *supra* note 1, at 14.

11. *See id.* at 14, 17.

unconstitutional. That is a strong charge, but it is also true. It also calls for strong measures in response, which we discuss below.

We begin this analysis from vastly different places. As people, lawyers, and law professors, we hold very different views about most of the important issues of the day. Our backgrounds are dissimilar, as are many of our values, interests, and areas of expertise. Yet, after starting at altogether different places, in the end, we are joined in conclusions and solutions and imagine that others, despite their varying points of view, may agree. Based on Supreme Court caselaw on judicial independence, along with two very recent cases from the Court of Appeals for the Fifth Circuit, we conclude that a judicial system that depends on revenue extracted from its "users"—criminal defendants, victims of civil forfeiture, and the like—violates due process of law because it is insufficiently independent and unbiased. We also offer a number of solutions that can be applied by both courts and legislatures.

I. THE LEGAL SYSTEM'S DEPENDENCE ON REVENUE FROM FINES, FEES AND FORFEITURES

A. Ferguson, Missouri, an Exemplar of a Conflict-Ridden System

Shortly after Michael Brown was killed in Ferguson, Missouri, on August 9, 2014, by Ferguson, Missouri police officer Darren Wilson, the United States Department of Justice began an investigation of the practices of the Ferguson Police Department.[12] That investigation would uncover and reveal a host of unconstitutional practices by elected officials, local law enforcement, and the municipal court. The Justice Department's investigation included weeks of data collection and analysis, records review, interviews, and observations, and resulted in a blistering report implicating the Ferguson Police Department as well as the Ferguson Municipal Court.[13] The Department of Justice concluded that the policies and practices disproportionately impacted Ferguson's African-American residents and "reflect[ed] and exacerbate[d] existing racial bias."[14] Moreover, the policies and practices that were discovered were not grounded in a legitimate desire to protect the community.[15] Rather, they were "shaped by the City's focus on revenue rather than by public safety

12. *See* DOJ REPORT, *supra* note 8, at 1.
13. *See id.*
14. *Id.* at 2.
15. *See id.* at 13.

needs" and resulted from "discriminatory intent"[16]

Elected officials in Ferguson depended upon the Ferguson Police Department and Municipal Court primarily to produce revenue for city operations. The revenue that was generated by police issuing citations and the court imposing fines and court costs accounted for almost 10% of the city's budget in 2010.[17] But, beginning in 2011, the city steadily increased the amount of revenue it expected the police and the court to generate and the police and the court system consistently met or exceeded those expectations.[18] By 2015, the fines and costs revenue accounted for almost 25% of the city's budget.[19]

Ferguson's elected officials relied on more than the subtle implications of the annual budget to communicate their expectations. They directly communicated their expectations to the Chief of Police, who in turn prodded officers to write more citations.[20] When revenues from sales tax collections fell short, the Chief Finance Director asked the police chief if the department could "deliver [a] 10% increase."[21] In order to do so, the Chief asked for more officers and, around 2010, instituted a change in shift schedules that enabled more officers to generate more tickets per shift.[22] From the change in shift schedules in 2010, until the year of Michael Brown's death, officers in Ferguson—a town of 21,000 residents—issued 90,000 citations and summonses for municipal code violations, averaging more than one citation per resident per year.[23] By 2013–2014, the number of citations issued increased by 50%.[24]

The expectation that the Ferguson Police Department would raise revenues for the city was well known to the individual police officers. Not only did the Chief of Police regularly transmit the information to officers, the department routinely ranked officers in terms of citations

16. *Id.* at 2.
17. *Id.* at 9.
18. *Id.*
19. *See id.* at 10.
20. *See id.*
21. *Id.* at 13.
22. *See id.* at 10. In 2014, the City's budget documents noted that since the shift change took effect "the percent of [police] resources allocated to traffic enforcement has increased," and "[a]s a result, traffic enforcement related collections increased." *Id.* An additional increase was noted in 2015, also attributed to the increased dedication of resources to traffic enforcement. *Id.*
23. *Id.* at 7.
24. *Id.* The investigation determined that the increase in citations was not attributable to an increase in crime by looking at the nature of citations and determining that the number of citations issued for the more serious infractions remained constant. *Id.* at 7 n.7.

written.[25] Lists including the officer's names and the number of tickets issued each month were posted in the department; those who wrote the most tickets were praised as being the most "productive," while those at the bottom of the list were chided, reassigned, evaluated poorly, or disciplined for their lack of productivity.[26]

Officers could, and frequently did, increase their productivity, by exercising their discretion to issue multiple citations during each citizen encounter.[27] Thus, for example, an officer who charged an individual with driving under the influence of an intoxicant would also cite the driver for any number of minor traffic infractions that came to light—speeding, failure to remain in lane, littering, no insurance, no seat belt, and others. Similarly, when an officer stopped an individual for walking on the street, rather than on the sidewalk, the officer could issue three citations—one for manner of walking, one for failure to comply, and one for impeding traffic. In 2013, for example, approximately 9,000 warrants were issued for over 32,000 offenses, thus indicating an average of more than three citations per warrant.[28]

This policy of overcharging was encouraged by the prosecution, who counseled officers to issue "all necessary summonses . . . for each incident."[29] The prosecution's justification for this policy was "to ensure that a proper resolution to all cases is being achieved and that the court is maintaining the correct volume for offenses occurring within the city."[30] The "correct volume" formula was a proxy for accomplishing the city's revenue expectations from fines and costs. In addition to coaching officers on how to add additional charges, the prosecution also rigorously prosecuted even the most trivial of offenses, virtually eliminated dismissals, regularly opposed alternative sentences, and routinely requested the higher fines in the

25. *See id.* at 11–12.

26. *Id.* In internal police memoranda, supervising officers were encouraged to assign officers who weren't producing to "prisoner pick up and bank runs." *Id.* at 12. Performance evaluation criteria included a category for "[i]ncrease/consistent in productivity, the ability to maintain an average ticket [sic] of 28 per month." *Id.*

27. *See id.* at 4. The investigation showed that officers exercised their discretion more harshly against African-American individuals than white individuals. *Id.* at 63. While 67% of Ferguson citizens are African-American, the investigation showed that 95% of the citations for manner of walking and 94% of the failure to comply citations—both trivial offenses that could easily have been disregarded—were issued against African Americans. *Id.* at 67.

28. *See id.* at 55.

29. *Id.* at 11.

30. *Id.*

range.[31]

From all indications, the officers not only increased their productivity, they also helped the prosecution's office assure the correct volume of offenses. According to findings of the Department of Justice, in 2014, at the end of the year, 24,000 traffic cases and 28,000 non-traffic cases were pending in the Ferguson Municipal Court; less than five years later, those numbers basically doubled, rising to 53,000 traffic cases and 50,000 non-traffic cases pending.

But neither the prosecution's zeal to maintain the correct volume of cases[32] nor the officers' sustained productivity could accomplish the revenue result desired by the city officials without the cooperation of the city's judicial system. The city's judicial system, the Ferguson Municipal Court, was organized as "a part of the police department."[33] The court staff included a municipal judge, who is elected by the city council and subject to reappointment every two years,[34] and a clerk and assistant clerks, who were supervised by the chief of police.[35]

The court's key role in revenue production was not left to chance. As they did with the police chief, city officials made it clear to the judge that "revenue generation" was a priority for court operations.[36] The amount of revenue that the judge produced through fines and costs was a key factor that the city council considered in determining

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31. *See id.* at 10–11, 69.

32. The prosecutor is also appointed by the City Council and serves also as City Attorney. *See id.* at 8.

33. *Id.* ("Ferguson's municipal court operates as part of the police department. The court is supervised by the Ferguson Chief of Police, is considered part of the police department for City organizational purposes, and is physically located within the police station. Court staff report directly to the Chief of Police.").

34. *See id.* at 11.

35. *See id.* at 8.

> [T]he Court Clerk, who is employed under the Police Chief's supervision, plays the most significant role in managing the court and exercises broad discretion in conducting the court's daily operations. Ferguson's municipal code confers broad authority on the Court Clerk, including the authority to collect all fines and fees, accept guilty pleas, sign and issue subpoenas, and approve bond determinations. Ferguson Mun. Code § 13-7. Indeed, the Court Clerk and assistant clerks routinely perform duties that are, for all practical purposes, judicial.

Id.

36. *Id.* at 14.

whether to reappoint the judge.[37] To inform the council's reappointment decision, the municipal court judge at the time of Michael Brown's killing, Judge Brockmeyer, reported to the council that he had created additional fees for failure to appear and increased fines for repeat offenders' subsequent violations, which could not have happened "without the cooperation of the Court Clerk, the Chief of Police, and the Prosecutor's Office."[38] In addition to applauding the judge's creation of new fees and imposition of higher fines,[39] the city leaders praised the judge for "significantly increasing court collections over the years."[40]

The primary method that the court used to increase collections was the threat that an arrest warrant would be issued leading to the arrest of those who failed to pay.[41] Whether to issue an arrest warrant was not determined by the nature of the underlying infraction. Nor was it motivated by public safety concerns. Rather, the "primary role of the warrant" was to "facilitate fine collection," in effect making the Police Department the "collection agency for [the] municipal court."[42]

Just as the municipal court accommodated the police department by imposing multiple sanctions for citations arising out of the same conduct and rarely allowing alternative sentences such as community service or probation, the police department accommodated the court by serving a "staggering" number of arrest warrants issued for the nonpayment of fines and costs.[43] The year that Michael Brown was killed, over 16,000 arrest warrants for nonpayment of fines, fees, and costs were outstanding, awaiting service on the indebted individual,

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37. When it came time to reappoint Judge Brockmeyer, a councilmember opposed the reappointment due to the judge's harsh and impatient courtroom demeanor. *Id.* at 15. While the member noted that "switching judges would/could lead to loss of revenue," he argued that it would be worth the loss because it is "important that cases are being handled properly and fairly." *Id.* In response, the city mayor favored the judge's reappointment because "[i]t goes without saying the City cannot afford to lose any efficiency in our Courts, nor experience any decrease in our Fines and Forfeitures." *Id.*

38. *Id.* at 14.

39. *See id.* at 10. In comparison to similar municipalities, Ferguson's fines were at the top of the list, with fines for discretionary offenses being many times higher than those in similar municipalities. *Id.* at 50, 52, 63. An example illustrates the starkness of the comparison. By fining individuals who could not provide proof that they were insured $375, rather than the median amount charged by most jurisdictions $175 charged by most offenses, Ferguson raised almost $300,000 in 2013. *Id.* at 52–53.

40. *Id.* at 14.

41. *Id.* at 55.

42. *Id.* at 55–56.

43. *Id.* at 44, 55.

who would then be brought to court and required to either make bond or remain jailed until fines and costs were paid.[44] As found by the DOJ, the Ferguson Municipal Court used "arrest warrants and the threat of arrest as its primary tool for collecting outstanding fines for municipal code violations."[45]

The issuance of an arrest warrant for those who missed court appearances or failed to make a payment pursuant to a payment plan was not based on the severity of their original infraction.

Despite the fact that the police department would not have arrested (and, for many infractions, *could not have* arrested) the individual for the original infraction, the court routinely issued arrest warrants for those individuals who failed to appear or failed to pay without any inquiry into potential justifications.[46] Additionally, for those who missed a court appearance, the judge created a new fine, which increased with each failure to appear.[47]

Some Ferguson citizens who faced arrest for failure to appear or pay would manage to post a bond and acquire release, but the city's bond practices were inconsistently applied and misunderstood. The amount of bail set for a particular individual seemed to be geared toward the amount of money the individual owed, but if the bond was forfeited—which would occur if the individual failed to appear—the amount deposited was contributed to the city coffers and not applied against the debt.[48] The Ferguson Municipal Court benefitted when higher bonds were set because, if those bonds were forfeited, more money went into the city treasury.[49]

The increase in citations and the frequent use of arrest warrants to jail those who had missed a court appearance or a payment resulted in a huge backlog of cases in the Ferguson Municipal Court. In the three or four court sessions held each month, it was not unusual for the court's docket for each session to include 1200–1500 cases, though

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44. *Id.* at 55.

45. *Id.*

46. *See id.* at 42–47. Ironically, though hundreds of individuals were jailed in Ferguson for failure to appear or failure to pay, the municipal court judge told the Department of Justice that in his 11 years on the bench, he remembered only once sentencing an individual to jail for a violation of the municipal code. *Id.* at 8–9.

47. *Id.* at 42.

48. *See id.* at 61.

49. *See id.* A similar mechanism was at work in New Orleans where a Judicial Expense Fund (JEF) dependent on revenues collected from fines, fees, and a percentage of bail bonds was administered by New Orleans judges and used to supplement a wide range of employment benefits for judges. The system was the subject of litigation in *Cain v. White*. Cain v. White, 937 F.3d 446 (5th Cir. 2019); *see* discussion *infra* notes 93–104.

on occasion that number would reach 2000.[50] From the perspective of the city council, these docket sizes were essential to produce the increased revenue from fines and costs on which the city depended. When these burgeoning caseloads indicated a need for more court staff, the council noted that the costs of adding staff would be "more than covered by the increase in revenues."[51] But from the perspective of the individual whose case was on the docket, these unwieldy dockets often meant multiple court appearances and days off work (when the court failed to conclude the docket and continued the case); a serious disincentive to challenge the allegations; and a keen motivation to agree to pay whatever fine the prosecution requested.

Reviewing the fines and fees structure, the use of arrest warrants, the bond system, the animosity toward those who wished to challenge their citations, and the structure in place to thwart any effort to resolve cases fairly and timely, the Justice Department rendered a blistering assessment of the Ferguson municipal court system.

> Ferguson has allowed its focus on revenue generation to fundamentally compromise the role of Ferguson's municipal court. The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests. This has led to court practices that violate the Fourteenth Amendment's due process and equal protection requirements. The court's practices also impose unnecessary harm, overwhelmingly on African-American individuals, and run counter to public safety.[52]

1. Before and After Ferguson

While the Ferguson Report was uniquely detailed and candid, the phenomena it detailed were neither unexpected, nor novel or random. They were not unexpected because, in the twenty-five years leading up to Michael Brown's death, the dramatic increase in criminal justice expenditures had required a similar increase in criminal justice funding. Because of the steady rise in the prison population—from 200,00 in 1972 to more than 2 million today—states found their

50. DOJ REPORT, *supra* note 8, at 9.
51. *Id.*
52. *Id.* at 3.

budgets stretched.[53] A 2015 study by the Council of Economic Advisors documented a 74% growth in criminal justice expenditures in the twenty-year period beginning in 1993 and ending in 2012.[54]

The dramatic increase of expenditures led state and local governments to search for funding sources. Rather than raise taxes, governments sought alternative methods of raising revenue. Some argued that those brought into the system, as its "users" were responsible for the increased expenditures, ignoring the criminal justice system's role in protecting society as well as the impact that legislation creating mandatory-minimum sentences had on criminal justice expenditures.[55] Governments found their alternative in a range of legal loopholes designed to avoid the constitutional prohibition on incarcerating individuals for debt,[56] by imposing a range of fees, costs, and surcharges on those who "used" the criminal justice system.[57] States alternatively label these fees as user, supervision, or pay-to-stay fees, contending that those who "use" the court's time, are supervised by court agencies, or are housed in jails should "pay" for the service.[58] Fees are charged for telephone calls, electronic monitoring, drug testing, probation supervision, expungement, and various other services.[59] Since 2010, forty-eight

53. *See* COUNCIL OF ECON. ADVISORS, ISSUE BRIEF FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONALLY IMPACT THE POOR 2 (2015) [hereinafter COUNCIL OF ECON. ADVISORS], https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

54. *See id.* (finding that expenditures were at $157 billion in 1973 and $273 billion in 2012. The expenditure growth was documented at 69% at the state level and 61% at the local level).

55. *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 11–14. Thus, the city leaders' similar argument to the Department of Justice was also neither novel nor unexpected.

56. *See* Bearden v. Georgia, 461 U.S. 660 (1983) (holding that an individual may not be imprisoned solely because of a lack of resources to pay a court-ordered sanction and confirming the holdings of Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971)).

57. *See* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 17 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf. Studies consistently show that the majority of individuals charged with offenses in state courts qualify for public defender services because they cannot afford to hire a lawyer. The result is that a high percentage of the fees that are charged—80–90% according to one study—are charged to those who meet the state's indigency standards. *See id.* at 4.

58. *See id.*

59. *See id.* at 8.

states have increased the fees assessed on defendants,[60] resulting in a staggering amount of debt—more than fifty billion dollars owed by approximately ten million people who "used" the criminal justice system.[61]

In addition to being predictable, the unconstitutional court system that the Department of Justice encountered in Ferguson was likewise neither novel nor random. For decades, organizations as diverse as the Conference of State Court Administrators and the American Civil Liberties Union had warned that the respect and integrity of the criminal justice system was diminished by the practice of primarily funding the system off the backs of the poor.[62] As early as 1986, the Conference of State Court Administrators (COSCA) adopted standards warning states against relying on court costs, fines, and fees as a funding mechanism for courts.[63] In its 2010–2011 policy paper entitled *Courts are not Revenue Centers*, COSCA included as a first principle that "[c]ourts should be substantially funded from general government revenue sources, enabling them to fulfill their constitutional mandates."[64]

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60. *See* KARIN D. MARTIN ET AL., NAT'L INST. OF JUST., SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 5 (2017), https://www.ncjrs.gov/pdffiles1/nij/249976.pdf. Similarly, while twenty-six of the states charged fees for probation and parole supervision in 1990, that number has now increased to forty-four. COUNCIL OF ECON. ADVISORS, *supra* note 53, at 3.

61. *See* MARTIN ET AL., *supra* note 60, at 5. *See generally* Rakesh Kochhar & Richard Fry, *Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RSCH. CTR. (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ (describing the racial disparity within wealth inequality since the end of the Great Recession).

62. *See* CARL REYNOLDS & JEFF HALL, CONF. OF STATE CT. ADM'RS, COURTS ARE NOT REVENUE CENTERS 1–2 (2011) [hereinafter COSCA 2011], https://cosca.ncsc.org/__data/assets/pdf_file/0019/23446/courtsarenotrevenuecenters-final.pdf; AM. C.L. UNION, IN FOR A PENNY, THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 8 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf. For a general discussion of how fairness impacts an institution's legitimacy, see Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283 (2003) (noting that the "key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public"). *See generally* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS (2002).

63. *See* COSCA 2011, *supra* note 62, at 1.

64. *Id.* at 7. In that same report, COSCA quoted a decision of the Texas Supreme Court that "[i]f the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general welfare through charges assessed to those who would utilize our courts." *Id.* at 1 (quoting LeCroy v. Hanlon, 713 S.W.2d

COSCA's concerns were driven by studies of state criminal justice systems undertaken years before the Department of Justice's study of the practices in the town of Ferguson. Despite the differences in time and place, the studies had remarkably similar findings and reached similarly disturbing conclusions. In 2010, studies of five geographically and racially diverse states led to a conclusion that the "new push for revenue has also undermined the integrity of the court system."[65] The "new push" referenced was the increase in criminal justice expenditures; the undermining of integrity was the conflict of interest that arose when courts depended on fees and costs to fund their operations.

> The courts' newfound vigor in assessing and collecting [legal financial obligations] 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 [legal financial obligations] 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. Poor defendants who are re-arrested and incarcerated for failing to pay face added costs, such as warrant fees, as well as booking and jail "pay-to-stay" fees.[66]

Five years after the COSCA study, a larger study involving fifteen states, exposed the connection between a court's over-reliance on fees and costs and a defendant's' difficulty in reentering society as a productive citizen following conviction.[67] Once again, the resulting harm to the justice system was underscored: "Overdependence on fee revenue compromises the traditional functions of courts and correctional agencies. When courts are pressured to act, in essence, as

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335, 341 (Tex. 1986)). COSCA has continued to propose policy reform, more recently in a 2015–2016 Policy Paper in which the organization calls for states to end debtors' prisons and asserts that "[s]tate and [l]ocal [l]egislative [b]odies [h]ave [m]ultiplied [f]ees as a [s]ubstitute for [a]dequately [f]unding [c]ourts[.]" ARTHUR W. PEPIN, CONF. OF STATE CT. ADM'RS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS 6 (2016), https://cosca.ncsc.org/__data/assets/pdf_file/0014/26330/end-of-debtors-prisons-2016.pdf.

65. AM. C.L. UNION, *supra* note 62, at 9.

66. *Id.* at 10.

67. *See* BANNON ET AL., *supra* note 57, at 13.

collection arms of the state, their traditional independence suffers."[68]

Even more fundamental to the court's integrity is the simple fact that when courts are funded by fines, fees, and costs assessed against only those who are *found guilty*, there is, as Justice Taft noted in *Tumey v. Ohio*, an "interest in reaching a conclusion against [the accused] in his case."[69] Entangling the administrative function of funding the courts with the judicial function of adjudicating cases based on the proof creates a financial incentive to convict, a temptation to disturb the balance in order to convict so as to impose the fines, fees, and costs. The conflict of interest that results when the judicial officer undertakes to both produce revenue and accomplish justice robs the court system of its fundamental core—judicial independence.

Moreover, this lack of independence on the part of the courts spills over into other actors in the criminal justice system. As was true in Ferguson, so too is it that across the country, fee-generating practices incentivize not only the judiciary, but also law enforcement and the prosecution who must rigorously charge and prosecute[70] in order to begin the cycle of revenue production; the supervising agencies who must supervise and monitor; and the clerks of the court who must collect. The interrelationship creates a "vicious cycle, where courts, jails, probation agencies, and others whose budgets draw from these revenue streams worry about the consequences of reducing the flow of court-generated revenue."[71]

Not only has the systemic taint been recognized by organizations all along the political spectrum, it has also resulted in far-reaching edicts from courts and judicial leaders. After appointing a National Task Force on Fines, Fees, and Bail (Task Force) in 2016,[72] the

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68. *Id.* at 2. To quote a Michigan judge, "there are days I feel like a tax collector." Elizabeth Hines, *Views from the Michigan Bench*, *in* TRENDS IN STATE COURTS, *supra* note 1, at 35.

69. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

70. Given that the vast majority of cases are plea-bargained, a decision to charge is in essence a decision to sentence, yet such decisions are not subject to the same conflict-of-interest standards as judges. We argue that they should be.

71. CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 2.

72. The Task Force was created "to develop recommendations and tools to promote the fair and efficient enforcement of the law; to ensure no person is denied access to the justice system based on lack of economic resources; and to develop policies relating to legal financial obligations that promote access, fairness, and transparency." *See* NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACS., PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0020/14195/principles-1-17-19.pdf.

Conference of Chief Justices[73] (COCJ) and COSCA endorsed principles developed by the Task Force, including the propositions that court should be "entirely and sufficiently funded from general government revenue sources" and not supported by "revenues generated by [l]egal financial obligations."[74] Courts may not be "established to be a revenue-generating arm of any branch of government—executive, legislative, or judicial."[75]

At the same time the COCJ and COSCA were ratifying principles that called for the removal of courts from the business of generating revenue, individual judges were analyzing whether court systems funded by fines, fees, and costs violated fundamental principles of due process and stripped the courts of their essential quality of independence. In cases brought throughout the country, advocates are challenging court financing schemes and the conflict of interest that exists when a court that adjudicates guilt or innocence is funded by those who are found guilty. In Doraville, Georgia, for example, a city with fewer than 8,500 residents, plaintiffs allege that city officials budgeted for 17%–30% of the city's revenue to be produced by fines and fees generated by law enforcement and city code enforcers.[76] A 2018 lawsuit, filed in the Northern District of Georgia, alleged that the city's reliance on fines and fees to fund government operations incentivized police officers to ticket and prosecutors and judges to convict, creating a "systemic policy, practice, and custom" of "taking actions in order to meet that budgeted amount" in violation of due process.[77] In denying the government's motion to dismiss, the district judge rejected the notion that "executive-judicial commingling is categorically required" before an unconstitutional conflict of interest could be found.[78]

All else being equal, imagine that direct evidence comes to light that one of Doraville's municipal court judges is, in fact, finding citizens guilty for violating city ordinances, even where proof of culpability is lacking, solely to increase revenue for the city. "In that

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73. The COCJ is comprised of the chief judicial officer in each of the fifty states, the District of Columbia, and several US territories. *See* CONF. OF CHIEF JUSTS., https://ccj.ncsc.org (last visited Sept. 6, 2021). It functions as a partner with the National Center for State Courts. *See* NAT'L CTR. FOR STATE CTS., *Associations & Partners*, https://www.ncsc.org/about-us/associations-and-partners (last visited Sept. 6, 2021).

74. NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACS., *supra* note 72, at 2–3.

75. *Id.* at 2.

76. Plaintiffs' Complaint for Declaratory & Injunctive Relief at 7, 10–11, Brucker v. City of Doraville, 391 F. Supp. 3d 1207 (N.D. Ga. 2019) (No. 1:18-CV-02375-RWS).

77. *Id.* at 28.

78. Brucker, 391 F. Supp. 3d at 1213.

event, could it be said that the tribunal is 'impartial and disinterested,' even though the judge has neither a 'direct pecuniary interest in the outcome' of cases, nor executive responsibilities? Surely not."[79]

In addition to suits that challenge the means by which court systems were funded, lawsuits challenge a range of specific penalties, fees, and practices. In many jurisdictions, statutes that suspend the driving privileges of those who are unable to pay fines, fees, and costs are being challenged.[80] Other lawsuits question the practice—and absurdity—of repeatedly fining individuals for municipal code violations for the purpose of generating operating capital for the courts. Some examples of these code provisions are laws that fine individuals who have "mismatched curtains," "doors without screens," and "dead vegetation."[81] When the conditions persist, additional fines are levied for the same condition, even when the property owner does not have the means to remedy the condition. The costs increase each month that the fine goes unpaid.[82]

The use of aggressive enforcement practices, such as impoundment or forfeiture, is also being tested. In Chicago, for example, a lawsuit challenging the city's practice of impounding and selling illegally parked automobiles when the owners cannot pay the parking ticket, tow charge, and storage fees resulted in a $4.95 million

79. *Id.* (quoting Marshall v. Jerricho, Inc., 446 U.S. 238, 243 (1980); Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

80. Two suits challenged these statutes that provided for license suspension in Tennessee. The first, *Thomas v. Haslam*, 329 F. Supp. 3d 475, 593–94 (M.D. Tenn. 2018), challenged a statute that mandated the suspension of driving privileges of indigent defendants who, for a period of a year or more, failed to pay their fines and costs arising from criminal convictions. The second case, *Robinson v. Purkey*, 326 F.R.D. 105, 116 (M.D. Tenn. 2018), challenged a similar statute that authorized, rather than mandated, suspension, but that applied to those who failed to pay fines and costs attributable to traffic offenses. The United States District Court granted summary judgment to plaintiffs in the first case and awarded a preliminary injunction in the second case. In May 2020, the United States Court of Appeals for the Sixth Circuit reversed the grant of injunctive relief, based primarily on a previous ruling in a Michigan case, holding that a rational basis supported Tennessee policy permitting suspension of driving privileges for nonpayment of fees arising from traffic violations. Robinson v. Long, No. 18-6121, 2020 WL 2551889, at *6 (6th Cir. May 20, 2020) (quoting Fowler v. Benson, 924 F.3d 247, 261–63 (6th Cir. 2019)).

81. *See, e.g.*, Civil Rights Class Action Complaint at 5–6, White v. City of Pagedale, No. 15-cv-1655 (E.D. Mo. Mar. 10, 2016).

82. *See, e.g.*, Lippman v. City of Oakland, 229 Cal. Rptr. 3d 206, 209 (Ct. App. 2017).

settlement and a reform of the city's impoundment policy.[83] Forfeiture practices—forfeiting and selling citizens' property and then depositing most of the proceeds into the police and prosecutor's accounts—have been declared unconstitutional in South Carolina, where, for example, an investigation revealed that between 2014 and 2016, agencies had seized $17.6 million dollars in citizen assets, 40% being forfeited from individuals who were not convicted of a crime.[84] Propelled by the Supreme Court's decision in *Timbs v. Indiana*,[85] similar practices are being challenged in lawsuits in New Mexico, Pennsylvania, Indiana, and Michigan.

2. Considering Institutional and Social Costs

More and more courts are recognizing—and we agree—that when a court system is funded largely through fines, fees, costs, and forfeitures, an institutional conflict of interest develops that offends due process, diminishes the court's integrity, and undermines its ability to be, and be perceived as, fair and impartial. And, while it might be easy to discount the negative perceptions of those caught up in the system, even those who are not overwhelmingly disfavor a system that punishes people for their inability to pay a debt.[86] "When states and localities use courts to fill gaps in their budgets, this leads to perverse incentives and erodes public trust in the judicial system."[87] To assure that courts' wish to retain their institutional legitimacy, these conflicts of interest must not go unchecked.

It is easy to see how those trapped in the system would view the

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83. *See* Heather Cherone, *Aldermen Greenlight Plan to Pay $4.95M to Settle Lawsuit Over CPD Impound Program*, WTTW (July 20, 2020, 4:23 PM), https://news.wttw.com/2020/07/20/aldermen-greenlight-plan-pay-495m-settle-lawsuit-over-cpd-impound-program. On July 20, 2020, the Chicago City Council settled the lawsuit and reformed the impoundment policy. *Id.*

84. *See* Order, County of Horry v. Twenty Thousand Seven Hundred and Seventy-One and 00/100 Dollars, No. 2017-CP-26-07411, 4–5 (S.C. Ct. C.P., Aug. 28, 2019), https://publicindex.sccourts.org/Horry/PublicIndex/PIImageDisplay.aspx?ctagency=26002&doctype=D&docid=1567016063507-983&HKey=84109575354847985106104689811410810111210010912156749772851027610397118988343576799565473529966117 85.

85. 139 S. Ct. 682, 691 (2019) (holding that the excessive fines clause of the Eighth Amendment applies to the states, and thus to *in rem* civil forfeiture proceedings).

86. In a 2016 survey conducted by the National Center for State Courts, 70% of those surveyed expressed discontent with a system that jailed individuals who could not pay debt. NAT'L CTR. FOR STATE CTS., THE STATE OF STATE COURTS POLL 6 (2016), https://cdm16501.contentdm.oclc.org/digital/collection/ctcomm/id/164.

87. CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 1.

system as fundamentally unfair. To those facing fines and fees they cannot possibly pay, the system is unfair because it ignores their economic situation. The system continues to punish them despite their inability to pay, and to some extent, perversely, punishes them more severely *because of* their inability to pay. Counter to all legitimate goals of punishment, the system punishes seemingly for punishment's sake with the only goal being to raise money to benefit the system. To those caught up in the system, it must seem that they are being punished for being poor. After all, they are forced to choose between paying the court, or paying for rent, buying food, or having electricity.

The working poor, like Ti, who face a loss of their driving privileges for failure to pay traffic fines and court costs, must risk imprisonment in driving to work in order to receive a paycheck. The impact extends beyond the individuals, to their families and their communities. Though perhaps not in the forefront, these human and societal costs are real.

The question, then, is whether the institutional, human, and societal costs are sufficiently offset by the benefits provided to the courts? Do the benefits make the costs tolerable? To the extent we know the answer, it seems to be "no." The debt collection system used by courts is largely ineffective. While states can point to the potential for an influx of capital by focusing on the amount of debt owed,[88] the reality is that most of the debt is neither collected[89] nor collectable.[90] Studies show that "[f]ees and other criminal justice debt are typically levied on a population uniquely unable to make payments."[91] The nature of the offenses themselves is more likely to ensnare the poor. Once a fine is imposed, the poor are less likely to be able to challenge the charge or pay the fine. The amount owed then escalates, with late-fees, court costs, and surcharges, putting the individual in a downward economic spiral that can have a range of debilitating collateral consequences.[92]

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88. One study has suggested that more than $50 billion in criminal justice debt is owed by 10 million people. *See* MARTIN ET AL., *supra* note 60, at 5.

89. The few states that have studied their collection rates have found collection to be very low. *See* COUNCIL OF ECON. ADVISORS, *supra* note 53, at 5 (stating that rates of 14, 17, 0, and 20% were found in Florida, Maryland, and Washington, respectively).

90. A 2017 study indicates that more than half of Americans could not afford a $500 unexpected expense. *See Nearly 60% of Americans Can't Afford Common Unexpected Expenses* 1, BANKRATE (Jan. 12, 2017), http://www.bankrate.com/pdfs/pr/20170112-January-Money-Pulse.pdf.

91. BANNON ET AL., *supra* note 57, at 4.

92. An individual with criminal justice debt may have limited employment

In addition, most states fail to consider the fiscal costs of collection. While states often delegate collection to private agencies, they fail to monitor the costs-to-collection ratio, making it impossible to determine whether they, in fact, collect more than they spend.[93]

When states ignore the institutional, social, and fiscal costs of a court system funded by debt collection, they are misled into believing that the system works and, consequently, less inclined to admit its failings, even those that strike at the heart of the court system's function.

Simply put, court systems that are funded primarily by fines, fees, and costs cannot fulfill their promise of providing fundamental fairness and equal justice. It is now abundantly clear that these systems disproportionately impact the poor and discriminate against people of color who, in addition to being more likely to suffer poverty, are also more likely to experience over-policing and uneven law enforcement.[94] As the 2016 *Confronting Criminal Justice Debt* study explained, "[p]oor people pay more" because they are poor.[95]

Excessive fees and fines needlessly enmesh poor people in the criminal justice system by spawning arrests, court proceedings, periods of incarceration, and other modes of supervision for those who lack the ability to pay. Criminal justice debt also contributes to mass incarceration by destabilizing people living at the economic margins and by impeding reentry of formerly incarcerated people who face impossible economic burdens, leading to cycles of poverty and imprisonment.[96]

And, as noted, the impact of criminal justice debt extends beyond the debtor to the family and community,[97] raising unemployment

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options and may suffer a denial of food stamps, public housing, and social security benefits. *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 15.

93. *See id.* at 2–3 (citing BANNON ET AL., *supra* note 57, at 11) (finding that none of the fifteen states surveyed monitored fiscal costs of collection).

94. For example, in 2014, the year Michael Brown was killed, the National Center for Law and Economic Justice reported that "[n]on-Hispanic Whites make up 61.8% of population, but only 42% of people in poverty. More than 26% of Black people and nearly 24% of Hispanic people were in poverty in 2014. In comparison, 10% of Non-Hispanic Whites and 12% of Asians were in poverty." NAT'L CTR. FOR L. & ECON. JUST., POVERTY STATISTICS 2 (2014), https://nclej.org/wp-content/uploads/2015/11/2014PovertyStats.pdf. *See generally* Kopf, *supra* note 9 (examining nationwide census data and finding that "[t]he best indicator that a government will levy an excessive amount of fines is if its citizens are Black.").

95. CRIM. JUST. POL'Y PROGRAM, *supra* note 1, at 15.

96. *Id.* at 1.

97. *See* Schwartztol, *supra* note 1, at 16 (citing MITALI NAGRECHA & MARY FAINSOD KATZENSTIEN WITH ESTELLE DAVIS, CTR. FOR CMTY. ALTS., FIRST PERSON

rates, increasing homelessness, and, potentially, encouraging criminal behavior.

In addition to criminalizing poverty, systems funded by criminal justice debt also tend to criminalize race. The disproportionate concentration in communities of color result not only in an increase in incarceration rates for African Americans but also in a community-wide increase in the racial wealth gap.[98]

Can a system so dependent on its "users" for revenue possibly be fair and impartial enough to satisfy the requirements of the Fourteenth Amendment's Due Process Clause? We argue that it cannot, and there is considerable support for our position, both in logic and in the case law.

3. Due Process

"No man," states a venerable common law rule, "should be a judge in his own case."[99] The impartiality properly demanded of a judge is not possible when the judge has a stake in the outcome of the adjudication. According to the United States Supreme Court, this principle is "a mainstay of our system of government."[100]

For this reason, the law has long required that judges not be parties to the cases they oversee, or closely related to parties in the case, or subject to rewards or penalties based on the outcome of the case.[101] There can be no due process when the one passing judgment

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ACCOUNTS OF CRIMINAL JUSTICE DEBT: WHEN ALL ELSE FAILS, FINING THE FAMILY 3 (2015), https://www.prisonpolicy.org/scans/communityalternatives/criminal_justice_debt.pdf).

98. *See id.* at 17.

99. The principle "*nemo iudex in sua causa*" dates back as far as the Justinian Code, FRED H. BLUME, ANNOTATED JUSTINIAN CODE 3.5.1 (Timothy Kearly ed., 2d ed. 2008).

100. Guiterrez de Martinez v. Lamagno, 515 U.S. 417, 428 (1995). The principle's common law history includes the famous *Dr. Bonham's Case*, in which it was ruled that a college of physicians empowered by statute to punish unlicensed medical practitioners could not serve as "judges, ministers, and parties" all at once. (1610) 77 Eng. Rep. 638, 652 (KB).

101. A case that illustrates the breadth of interest that corrodes due process is *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). Although the case arose in the context of judicial disqualification, its holding confirms the general principle that those with a stake in the outcome of a case should not participate in its resolution. In *Lavoie*, the Alabama Supreme Court issued an unsigned per curiam opinion holding that partial payment by an insurance company did not bar bad-faith suits or punitive damages. Among those joining the majority was Justice Embry, who previously had filed both an individual action and a class action against insurance companies, raising

is predisposed to judge in favor of one side.

These rules held well enough until recently, but we believe that it is time to take a broader look at what constitutes impartiality, and due process, in a judicial (and law enforcement) system that increasingly depends on fines, fees, and forfeitures not simply as punishments, but as major sources of operational funds. Inspired by two recent decisions from the United States Court of Appeals, we argue that when everyone participating in the justice system is aware that the system itself depends on sufficient revenue from fines, fees, and forfeitures, that very dependency is a conflict of interest sufficient to violate due process rights. In light of the extent to which the modern judicial system—and, indeed, the entire law enforcement apparatus—depends upon extracting money from a steady stream of individuals who appear before it, creating an untenable vested interest in charging and collecting fines and fees, the result is a fundamentally unfair system. At a time when funding, and defunding, law enforcement is the subject of much debate, it is worth considering the incentives that some sorts of funding can create.

4. Adjudication and Conflicts of Interest

Two classic Supreme Court cases, *Tumey v. Ohio*[102] and *Ward v. Monroeville*,[103] explain the relationship between conflicts of interest and due process rights in the context of adjudication. In *Tumey*, an Ohio statute allowed village mayors to sit as judges in criminal cases involving possession of illegal alcoholic beverages.[104] Fines awarded in such cases were to be split among the arresting officers, the prosecuting attorney, and the mayor, with 50% going to the village treasury.[105] This division of funds was, according to the Supreme Court, for the "purpose of stimulating the activities of the village officers to such due enforcement."[106]

The financial scheme was the source of some controversy in the

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similar issues. When the case reached the United States Supreme Court, the Court held that "Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." Thus, Justice Embry's interest in the outcome of the case was "direct, personal, substantial, [and] pecuniary," and he acted as "a judge in his own case." *Id.* at 824 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

102. 273 U.S. 510 (1927).

103. 409 U.S. 57 (1972).

104. *Tumey*, 273 U.S. at 516–17.

105. *Id.* at 517–19.

106. *Id.* at 521.

village, and its retention was based on budgetary considerations.[107] The sums involved were nontrivial for the place and time and revenue was distributed between the state and the village including in a so-called "secret service fund," from which the prosecutor, marshals, inspectors, and other employees received payment for services connected to the prosecution.[108] The mayor-judge received a salary supplement from the cases designated as "his fees and costs."[109]

Per Chief Justice Taft, the Court opined that this system violated due process:

> [I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.
>
> The mayor of the village of North College Hill, Ohio, has a direct personal pecuniary interest in convicting the defendant who came before him for trial, in the $12 of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional but was the result of the normal operation of the law and the ordinance.[110]

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107. *Id.*
108. *Id.* at 518.
109. *Id.* at 521.

> Between May 11, 1923, and December 31, 1923, the total amount of fines for violation of the prohibition law collected by this village court was upwards of $20,000, from which the state received $8,992.50, North College Hill received $4,471.25 for its general uses, $2,697.25 was placed to the credit of the village safety fund, and the balance was put in the secret service fund. Out of this, the person acting as prosecutor in the liquor court received in that period $1,796.50; the deputy marshals, inspectors and other employees, including the detectives, received $2,697.75; and $438.50 was paid for costs in transporting prisoners, serving writs and other services in connection with the trial of these cases. Mayor Pugh received $696.35 from these liquor cases during that period as his fees and costs, in addition to his regular salary.

Id. at 521–22.
110. *Id.* at 523.

Although *Tumey* is generally viewed as illustrating the mayor's personal pecuniary conflict of interest, the underlying rationale of the decision is that the mayor is part of an entire *system* that has a financial incentive to convict, as the Court was careful to spell out:

> But the pecuniary interest of the mayor in the result of his judgment *is not the only reason for holding that due process of law is denied* to the defendant here. The statutes were drawn to stimulate small municipalities, in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the state and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial, and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias, or willful disregard of duty by the trial court. It specifically authorizes the village to employ detectives, deputy marshals, and other assistants to detect crime of this kind all over the county, and to bring offenders before the mayor's court, and *it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation.* The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that *the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court.* The mayor represents the village and cannot escape his representative capacity. On the other hand, he is given the judicial duty, first, of determining whether the defendant is guilty at all; and, second, having found his

> guilt, to measure his punishment between $100 as a minimum and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases cited above in the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.[111]

Thus, the mayor was disqualified as a judge for two reasons: "which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village."[112] And there is more than a whiff of suspicion in the opinion regarding the financial incentives provided to other players, and in fact to the entire justice system, to pursue conviction for purely financial reasons.[113]

In the later case of *Ward v. Village of Monroeville*, the Court applied the *Tumey* principle to the situation in another Ohio village, where the mayor was not directly compensated from the revenue generated by the fines.[114] Although the mayor's financial interest was not direct and immediate, the Court held, it was still substantial enough to make his participation in adjudication a violation of due process.[115] How substantial was the mayor's financial interest? The Court noted that it was quite substantial indeed: A "major part of village income is derived from the fines, forfeitures, costs and fees imposed" by the Mayor's Court.[116] In 1964, this income amounted to

111. *Id.* at 532–34 (emphasis added).

112. *Id.* at 535.

113. In referencing the *Tumey* decision 90 years later, the Supreme Court noted that the "Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality." Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 878 (2009).

114. 409 U.S. 57, 58 (1972).

115. *Id.*

116. *Id.*

$23,589.50 against total village revenues of $46,355.38—more than half.[117] In other years it was similarly substantial.[118] The Court noted that the revenue from the Mayor's Court was so substantial that when it was threatened by legislative change, the village hired a management consultant for advice on how to deal with the shortfall.[119]

Quoting *Tumey*, the Court reasoned:

> The fact that the mayor there shared directly in the fees and costs did not define the limits of the principle. Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," . . . the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . ." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."[120]

The conflict of interest that offends due process can be systemic, not simply individual.[121] In *Gibson v. Berryhill*,[122] the Supreme Court found due process violated by a conflict of interest on the part of the Alabama Board of Optometry. Members of the Board were all optometrists in private practice, and were sitting in judgment of competing optometrists employed by corporate optometry businesses, which the Board was explicitly trying to drive out of business.[123]

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117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 60 (citations omitted).
121. In fact, the origins of the principle can be traced to a case involving systemic conflicts of interest. *See* cases cited *supra* note 100, 101.
122. 411 U.S. 564, 578 (1973).
123. *Id.* at 571.

Noting that the district court had found that "success in the Board's efforts would possibly redound to the personal benefit of members of the Board," the Court upheld its finding that the Board's conflict of interest disqualified the Board from resolving the matter.[124]

Thus, whether an apparent conflict of interest is sufficient to violate due process is determined by an objective view of the circumstances. It does not turn on whether an actual financial benefit is obtained; nor does it depend upon the actual subjective intent of the adjudicator. Accordingly, most recently, in *Caperton v. A.T. Massey Coal Co.*, the Supreme Court applied a due process analysis in a case in which a party to litigation had been instrumental in financing a West Virginia judge's election. Holding that the Due Process Clause required judicial recusal, despite the absence of proof of actual bias or direct economic benefit, the Court further solidified that due process must be "implemented" by an objective standard, not one requiring proof of "actual bias."[125] An objective standard is appropriate because of the complexity of ascertaining subjective intent and the difficulty of reviewing an adjudicator's claimed intent. But by far, the most compelling rationale for the objective standard is one that the Court has recognized consistently: "to perform its highest function in the best way, 'justice must satisfy the appearance of justice.'"[126]

Most recently, two decisions from the U.S. Court of Appeals for the Fifth Circuit, decided by two separate panels within a week of each other, have underscored the risks involved in running a judicial system on revenue from fines and fees. Both had to do with the "Judicial Expense Fund," (JEF) a fund administered by New Orleans judges that depended on revenues collected from fines, fees, and a percentage of bail bonds. In both cases, the Fifth Circuit found a conflict of interest sufficient to violate due process rights, even though the judges involved did not profit directly, because the money involved redounded to the benefit of judges and the judicial system that they administered.

Money from the Judicial Expense Fund was used to pay for:

> [S]alaries and related-employment benefits (excluding the judges), CLE travel, legislative expenses,

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124. *Id.* at 578.

125. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 878–80 (2009) (citing Tumey v. Ohio, 273 U.S. 510, 532 (1927); Mayberry v. Pennsylvania, 400 U.S. 455, 465–66 (1971); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)); *see also* Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009) (discussing *Caperton* and judicial conflicts of interest).

126. *In re* Murchison, 349 U.S. 133, 136 (1955) (citations omitted).

> conferences and legal education, ceremonies, office supplies, cleaning supplies, law books, bottled water, jury expenses, telephone, postage, pest control, dues and subscriptions, paper supplies, advertising, building maintenance and repairs, cleaning services, capital outlay, equipment maintenance and repairs, lease payments, equipment rentals, professional and contractual expenses, the drug testing supplies, coffee, transcripts, insurance, and miscellaneous.[127]

Though the fund could not be used to augment judicial salaries, it could be used to pay the salaries of other court personnel, and to cover professional liability insurance. Each judge was allocated $250,000 from the fund to cover personnel salaries, and $1,000 for court expenses.[128]

The two cases challenged different aspects of revenue collection as creating a conflict of interest. In *Cain v. White*, the plaintiffs challenged the funding of the JEF from fines and fees that are set by judges, arguing that judges would be encouraged by the funding to assess more and higher fines and fees than otherwise.[129] Writing that "the issue here is whether the Judges' administrative supervision over the JEF while simultaneously overseeing the collection of fines and fees making up a substantial portion of the JEF, crosses the constitutional line," the Fifth Circuit held that it did.[130]

Even though no money wound up directly in the judges' pockets, the JEF had the effect of making their lives easier, and insufficient funding in the JEF had the effect of making their lives harder:

> When collection of the fines and fees is reduced, the OPCDC can have a difficult time meeting its operational needs, leading to cuts in services, reduction of staff salaries, and leaving some positions unfilled. During these times, the Judges have attempted to increase their collection efforts and have also requested assistance from other sources of funding including the City of New Orleans.[131]

The judges argued that they were highly resistant to temptation.

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127. Cain v. White, 937 F.3d 446, 448–49 (5th Cir. 2019).
128. *Id.*
129. *Id.*
130. *Id.* at 451.
131. *Id.* at 449.

Rather than a standard involving conflicts that would potentially tempt the average man, they argued for one that recognized their greater moral fiber: "Essentially, the Judges argue that an average *man* might be swayed by the institutional interest at play here, but not an average *judge*."[132] The court was unimpressed: "The caselaw simply does not support such a distinction."[133]

On examining the record, the Fifth Circuit found a situation much like that in *Ward v. Monroeville:*

> The district court very thoroughly examined the ways in which the judges have an institutional interest in the JEF. It observed that the '[f]ines and fees revenue goes into the Judicial Expense Fund,' over which 'the Judges exercise total control.' It noted that while the money does not support the Judges' personal salaries, it largely goes to support the salaries of each Judges' staff. In addition, the district court noted that while some of the money collected from fees is earmarked for specific purposes, the revenue all goes to the JEF and makes up approximately one-fourth of the OPCDC's budget.[134]

Like the mayor of Monroeville, the court found, the judges were too dependent on the revenue to support the operation they administered not to be influenced by funding. The test employed was not a bright-line test based on specific roles, but rather a "totality of the circumstances" test:

> We agree with the district court that the situation here falls within the ambit of *Ward*. In doing so, we emphasize it is the totality of this situation, not any individual piece, that leads us to this conclusion. In sum, when everything involved in this case is put together, the "temptation" is too great.[135]

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132. *Id.* at 451.

133. *Id.* The Fifth Circuit's analysis is consistent with that of Justice Kennedy in his thoughtful discussion of the evaluation of judicial bias in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882–84 (2009) ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends
the real motives at work in deciding the case.")

134. *Cain*, 937 F.3d at 454 (citations omitted).

135. *Id.* at 454 (footnote omitted).

Similarly, in *Caliste v. Cantrell,* another panel of the Fifth Circuit decided another challenge to the Judicial Expense Fund, in this case to its funding via a levy on commercial bail bonds.[136] Under Louisiana law, when a defendant secures a commercial bond to guarantee his or her presence at trial—which "[j]ust about every defendant" does, "as that requires paying only a fraction of the bond amount,"—1.8% of the bond's value is deposited in the JEF. [137] The problem with that, according to plaintiffs:

> When a defendant has to buy a commercial surety bond, a portion of the bond's value goes to a fund for judges' expenses. So the more often the magistrate requires a secured money bond as a condition of release, the more money the court has to cover expenses. And the magistrate is a member of the committee that allocates those funds.[138]

Noting that "the mere threat of impartiality" violated due process[139], the court found such a threat in this case. The magistrate was in the same situation, again, as the mayor of Monroeville:

> Because he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate. And the bond fees impact the bottom line of the court to a similar degree that the fines did in *Ward,* where they were 37–51% of the town's budget. The 20–25% of the Expense Fund that comes from bond fees is a bit below that percentage but still sizeable enough that it makes a meaningful difference in the staffing and supplies judges receive. The dual role thus may make the magistrate "partisan to maintain the high level of contribution" from the bond fees.[140]

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136. Caliste v. Cantrell, 937 F.3d 525 (5th Cir. 2019).
137. *Id.* at 526.
138. *Id.*
139. *Id.* at 530.
140. *Id.* at 531 (citation omitted) (quoting Ward v. Monroeville, 409 U.S. 57, 60 (1927).

Taken together, these two cases represent a rededication to the principles of *Ward*, along with a newfound recognition that the sort of problems identified there apply in circumstances reaching far beyond the village courts of Ohio. The violation of due process does not turn on the nature of any particular structure or financial arrangement, but rather whether, taken as a whole, the structure of financial arrangements involved would tempt an average person to lean in the direction of the state, because the legal machinery would benefit from the resulting infusion of funds, or suffer from the lack of such an infusion. This was a problem in the village of Monroeville, and it was a problem in New Orleans, even though the decisionmaker did not obtain any direct (or even diffuse and indirect as in *Gibson v. Berryhill*) personal financial benefit. What makes this most significant, as we have demonstrated, is that such institutional financial incentives now pervade the state judicial and law enforcement apparatuses.

5. Solutions: Due Process in A Fee-Based State

So far, we have shown the standard for due process in adjudicatory matters where the adjudicator stands to benefit, institutionally, from a conviction and resulting penalty and depends, to a significant degree, on wringing revenue out of defendants and does so in a way that disproportionately impacts the poorer segments of society. Because this is the case, and because every state participant in the system is aware of that dependence to a greater or lesser degree, we would argue—in fact, we are arguing—that they are all substantially in the role of the mayor of Monroeville. While the system as it operates may not directly place money in their pockets, it is nonetheless the case that their families, their livelihood, and their day-to-day quality of life are strongly impacted by the system's extraction of fines, fees, and forfeiture revenues from the people who come before them. The system, as an institution, and those who draw paychecks from it, have a vested interest in being funded and, as such, are too dependent not to be influenced.

So, what solutions do we propose? There are several, on scales both large and small. On the smallest scale, courts—especially reviewing appellate courts—need to be more willing to police excessive fines, which are explicitly prohibited by both the United States Constitution and forty-nine of fifty state constitutions.[141] In

141. The exception is Illinois, whose state constitution lacks such a clause. *See generally* ILL. CONST.

doing so, it's important to remember that fines that don't seem excessive to middle and upper-middle-class lawyers and judges with money in the bank can be financially disastrous, or simply unpayable, to many poverty-stricken defendants. The lower the ceiling on acceptable financial penalties, the less temptation on judges to levy those penalties out of conscious or unconscious institutional concerns.

Many of our reform suggestions require only that judges return to the business of judging. By this we mean that judges must undertake an inquiry that is consistent with the essential promises of due process.[142] In considering whether to impose a penalty, judges must evaluate both the private and governmental interests at play, applying the fundamental factors test recognized more than fifty years ago in *Mathews v. Eldridge* and *Goldberg v. Kelly*.[143]

First, judges must evaluate whether a fine is a meaningful punishment alternative in the case. An individual should not be fined, simply because the offense provides for a fine. Rather, courts should undertake to determine whether a fine is the appropriate punishment in the case, given the nature of the offense and the nature of the offender. But that is only the first consideration. If a fine is appropriate, the judge must also determine what amount is appropriate, resisting the urge to simplify into a "one fine fits all" system of punishment.[144] In determining both whether to impose a fine and what fine is appropriate, courts must consider an individual's ability to pay. In evaluating this factor, courts may be aided by

142. For more than a century, the Supreme Court has recognized that due process incorporates the right to a meaningful hearing in advance of deprivation of a property interest. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."); Dent v. West Virginia, 129 U.S. 114, 123–25, (1889).

143. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

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

> The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.

Id. at 669–70 (citations omitted).

guidelines adopted and enforced by state supreme courts, but courts must remember their obligations to make these determinations on the record after a hearing during which the individual's ability to pay is meaningfully considered.

Almost always, courts will benefit by appointing counsel to represent the individual at the hearing at which the ability to pay is considered.

Once a court determines that an individual is able to pay and the amount of the payment, the court, or trained court staff, should determine the method of payment. When the facts support it, an individual should be allowed a reasonable interest-free, penalty-free payment plan. Likewise, when a determination is made that the individual is unable to pay, courts should be open to alternative methods of punishment, including community service, but not incarceration. When court-ordered fines and fees have not been paid, courts must monitor the mechanisms used to enforce payment. Individuals who have not paid should not be subject to arrest. As is true of most sentencing decisions, the court's determination should be subject to appellate review.

Courts must also monitor other actors in the system, supervising prosecutors much more closely where financial temptations exist. Were a citizen to offer a prosecutor $10,000 to prosecute an enemy, we would not hesitate to call that a bribe illegitimating the prosecutor's decision to do so. When, instead, that prosecution results in fines, fees, or forfeitures bringing $10,000 into the prosecutor's office, perhaps some similar degree of skepticism is justified. This is particularly true since, as mentioned before, the prevalence of plea-bargaining, and the often steep penalties, in terms of increased charges, laid on defendants who refuse a plea deal, means that the decision to charge a defendant, and the offering and acceptance of plea bargains, are often, effectively, adjudicatory processes themselves.[145] Closer judicial supervision of plea deals, especially those that produce revenue for the prosecution or for the law enforcement agencies it is intertwined with might help, but there remains the problem that the supervising judges also know, at some level, that the entire system depends on such revenues.

At the largest scale, the solution becomes simpler: Courts must be fully funded from state revenues, not from court-produced fines and

145. *See* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is A Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013) (explaining that the most significant part of the criminal justice process, decisions on charging and plea bargains, are largely exempt from due process review and grant prosecutors enormous discretionary power).

fees. We must simply require that all revenues from fines, fees, and forfeitures be deposited in the state's general fund, rather than remaining at the disposal of the system that has responsibility for prosecuting and adjudicating those accused of crimes. To the objection that this would leave the legal system underfunded, we have two answers: First, to the extent that is true, it is an admission that we are right about the corrupting potential of such funding mechanisms, and second, that traditionally in our democracy, voters and taxpayers get to decide how well-funded various government functions should be through the mechanism of legislative appropriations. Bypassing the appropriations process by letting the criminal justice system "self-fund" with money taken from defendants is, in this sense, un-democratic.

Our earlier suggestions could, in principle, be instituted by courts, even trial courts, themselves. Requiring that income from judicial proceedings must be deposited in the state's general fund rather than redounding to the profit of courts and law enforcement could be instituted either legislatively or judicially. In practice, a legislative solution seems unlikely given the realities of state politics. But given that prosecutions and adjudications by courts and institutions possessing a financial incentive to find defendants guilty are, as we have explained, unconstitutional, such a solution could be, and should be, imposed by appellate courts in the states, and even in the United States Supreme Court.

Could courts legitimately require that money from fines, fees, and forfeitures be deposited in the general fund—or, to phrase it differently, that all revenues in support of law enforcement and the judiciary come from the general fund? Absolutely, given that due process demands it. And there is precedent for just that sort of approach, though in a different constitutional context.

In the celebrated dormant commerce clause case of *West Lynn Creamery v. Healy*, the Supreme Court confronted a two-part Massachusetts scheme that taxed all milk sold in the state, about two thirds of which was from out-of-state, but that then rebated the proceeds to Massachusetts dairy farmers. This was an ingenious effort on Massachusetts' part, since each half of the scheme, a uniform tax on the one hand, and a state-funded subsidy on the other, was permissible under existing commerce clause doctrine.[146]

But, the Court held, the combination of the two was impermissible because the effect was indistinguishable from a tariff on out-of-state

146. West Lynn Creamery v. Healy, 512 U.S. 186 (1994).

milk.[147] Furthermore, the usual political checks on taxation were absent from this scheme:

> By conjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone. . . . [W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse . . . .[148]

Justices Scalia and Thomas concurred, but argued that the outcome might be different if the revenues from the tax were paid into the state's general fund, rather than reserved for the dairy farmers:

> I would therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund. Perhaps, as some commentators contend, that line comports with an important economic reality: A State is less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing, non-protectionist purposes.[149]

Similarly, where money from fines, fees, and forfeitures is paid into the general fund there is no temptation on the part of law enforcement or adjudicators to lean in a particular way so as to maximize the financial prospects of their own offices or of those they depend on. (In fact, the legal provisions allowing these agencies to benefit from their prosecutions, which parallel the financial incentives to prosecutors and police under the statute at bar in *Ward,* are no doubt *intended* to affect their judgment, as the incentives in *Ward* were.) One might characterize the resulting remedy as a requirement that all such revenues be paid into the general fund, or, alternatively, as a requirement that the agencies in question be funded by general revenues. In either case, the incentive to engage in particular kinds of prosecutions, or to enter into particular kinds of plea deals, based on revenue is removed.

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147. *Id.* at 188.
148. *Id.* at 199–200.
149. *Id.* at 211–12 (Scalia, J., concurring).

We said that this remedy is simple, and it is. This is a remedy that could be imposed judicially, as a matter of due process, or legislatively, though the former seems more likely than the latter. That said, it is no less sweeping for its simplicity. Undoing a system of funding that has taken over much of the criminal justice system is not a small thing, however simple. The consequences would be substantial, and courts—who often seem as dedicated to the smooth functioning of the machinery of government as to abstract concepts of justice—may find it a hard pill to swallow. But it is necessary medicine. No "justice system" worthy of the name convicts people simply because it is paid to do so.

CONCLUSION

We can attempt to staff our law enforcement agencies, our prosecutors' offices, and our courts with individuals immune to the temptations provided by financial structures that reward assessing financial penalties against citizens. But despite our best efforts, we will wind up staffing those institutions with human beings, and human beings, by their nature, are not immune to temptation.[150] Put simply, if we wish for our criminal justice system to do better, we must stop rewarding it for doing worse.

Although we began this study from rather different political perspectives, we have reached the same, inescapable conclusion. To operate as legitimate institutions of government, our courts must be freed from serving as revenue centers. If courts are to command respect; if their judgments are to be honored and observed; if, in fact, the most fundamental guarantee of the Constitution is to be valued, then our courts must be funded neutrally by state revenue, and not employed as revenue agencies. We must remove the taint that adheres when courts depend on fines, fees, and forfeitures to operate, and we must end the criminalization of poverty. Justice requires it.

150. The apostle Paul is credited with saying that "[n]o temptation has overtaken you that is not common to man." 1 *Corinthians* 10:13.