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## Forcing Judges to Criminalize Poverty in North Carolina

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# FORCING JUDGES TO CRIMINALIZE POVERTY IN NORTH CAROLINA

Gene Nichol

## About the Author

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## Introduction

Since 2011, North Carolina has undertaken the stoutest, most enthusiastic war on poor people seen in the United States in the past half century.<sup>1</sup> So it is no great surprise that the state boasts one of the more pervasive and ambitious user fee schemes in the country—much of it developed even before 2011—to purportedly pay for the operation of the criminal justice system and support the state treasury more broadly.<sup>2</sup> There are court costs, attorney fees, lab fees, expert witness fees, probation fees, jail fees, community service fees, defendant monitoring fees, sheriff’s pension fees, law enforcement retirement fees, and failure to pay fees. And more. The list is long and Kafkaesque. It frequently leads to levies of a thousand dollars or more for relatively modest offenses. And, of course, it often triggers other ancillary punishments—even incarceration.<sup>3</sup>

1. See GENE R. NICHOL, *THE FACES OF POVERTY IN NORTH CAROLINA: CONVERSATIONS WITH OUR INVISIBLE CITIZENS* 158–74 (2018).
2. See Heather Hunt & Gene R. Nichol Jr., *Court Fines and Fees: Criminalizing Poverty in North Carolina*, N.C. POVERTY RES. FUND, Winter 2017, [https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1443&context=faculty\\_publications](https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1443&context=faculty_publications).
3. *Id.* at 2–6; see also Cristina Becker, *At All Costs: The Consequences of Rising Court Fines and Fees in North Carolina*, ACLU N.C., 16–22 (2019), [https://www.acluofnorthcarolina.org/sites/default/files/field\\_documents/aclu\\_nc\\_2019\\_fines\\_and\\_fees\\_report\\_17\\_singles\\_final.pdf](https://www.acluofnorthcarolina.org/sites/default/files/field_documents/aclu_nc_2019_fines_and_fees_report_17_singles_final.pdf).

The poverty center where I work has done a couple of studies of the North Carolina fees program.<sup>4</sup> Our colleagues at the North Carolina ACLU have examined the system as well.<sup>5</sup> The results are perhaps unsurprising to those who study this demoralizing field. They were more of a jolt to me. I was distressed to learn how few judges—even goodhearted ones—had ever heard of Bearden<sup>6</sup> standards or of required ability to pay hearings. It was also alarming to see how dramatically fee waivers and incarceration punishments vary from county to county and from judge to judge within counties or judicial districts. Even if one believed in a user fee scheme—which I don’t—it would be impossible to justify its utterly haphazard application. Even worse, the fee system’s implementation often seems perverse—with the harshest, most unyielding regimes frequently inflicted in the very poorest judicial districts. Pervasive poverty seems to work against the granting of fee waivers rather than for them, trapping folks in an everdeepening cycle of inescapable hardship.<sup>7</sup>

### I. Bullying Judges to Deny Waiver Requests

The North Carolina criminal justice defendant user fee scheme is (unfortunately) common in the United States. But the state has now developed an ambitious enforcement/collection scheme which is perhaps singular. The U.S. Supreme Court has long held that it is unconstitutional to incarcerate defendants because of their inability to pay court-ordered monetary obligations.<sup>8</sup> To avoid that impermissible injustice and moderate overarching economic hardship claims, judges are often allowed to waive or remit many fines and fees. The North Carolina court fees law, N.C.G.S. sec. 7A-304, not only establishes most court fees, but also governs the ability of judges to waive them.

A very high percentage of North Carolina criminal defendants are indigent. Nationally, the figure is 80–90 percent, and our poverty rate is far higher than those experienced in most states.<sup>9</sup> Despite that, statewide, fewer than 5 percent of court-ordered monetary obligations are waived. In a third of North Carolina counties the waiver rate is plainly negligible, less than 2 percent.<sup>10</sup> Still, since 2011, the North Carolina General Assembly has worked persistently to reduce these modest numbers. In the process, legislators have pressed indigent defendants further into a

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4. See Hunt & Nichol, *supra* note 2; see also Gene Nichol & Heather Hunt, *Forcing Judges to Criminalize Poverty: Eroding Judicial Independence in North Carolina*, N.C. POVERTY RES. FUND, Fall 2018, [https://www2.law.unc.edu/documents/poverty/publications/judicialindependence\\_final.pdf](https://www2.law.unc.edu/documents/poverty/publications/judicialindependence_final.pdf) [hereinafter *Forcing Judges to Criminalize Poverty*].

5. See BECKER, *supra* note 3.

6. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (limiting the power to jail criminal defendants for failure to pay fees).

7. See Hunt & Nichol, *supra*, note 2, at 6–8, 15–16.

8. See *Bearden*, 461 U.S. at 672–73.

9. *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 5.

10. *Id.*

crushing cycle of poverty. They have also bullied judges and repeatedly threatened their independence. The constitutional assault has arisen from multiple sources and for distinct purposes.

In 2011, the North Carolina court fees law was amended to apply various fees automatically, by default. Judges wanting to waive such fees were then required to produce “a written finding of just cause” to support the decision.<sup>11</sup> The North Carolina Administrative Office of the Courts (AOC), the state court system’s administrative body, was also ordered to maintain records of all cases in which court fees were waived and to file an annual report on the number of waivers granted.<sup>12</sup> The General Assembly amended the law again in 2012 mandating that judges justify any decision to waive fees by presenting “findings of fact and conclusions of law” in support of the just cause requirement enacted the year before.<sup>13</sup>

Then they upped the ante. In 2014, the General Assembly required that the annual AOC fee report be expanded to include a separate waiver listing for each judge and judicial district—including all waivers granted. Judges call it the “shaming report.”<sup>14</sup> It is widely understood by local judicial officers as a way to control and intimidate them. North Carolina judges are elected, and the annual report can be readily used to paint candidates as soft on crime. When asked about the purpose of the report one Mecklenburg County judge said the goal is “to constrain judges in (their) decision-making process.” Richard Boner, a retired Charlotte judge, asked “what purpose does it serve? To embarrass people, I guess?”<sup>15</sup> But, he added:

They can put my name on a list if they want to, but I [am not] going to send people to jail if they [are] doing the best they [can] do, and for bad health or some other reason they couldn’t afford the payment. That’s no better than a debtor’s prison.<sup>16</sup>

Former Durham County District Court Chief Judge (and current Democratic member of the House of Representatives) Marcia Morey added bluntly: “Evidently the legislators wanted to know who the ‘soft’ judges were that allowed people not to fork over money they did not have.”<sup>17</sup> Judge Pat Devine fit the “shaming” scheme into a larger pattern:

There is no doubt that the legislature’s enforcement of fines and fees—the pressure to not grant waivers—is part of a larger effort to control

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11. Current Operations and Capital Improvements Appropriations Act of 2011, No. 2011-145, § 15.10(a), 2011 N.C. Sess. Laws 253, 521.

12. *Id.* at § 15.10(b).

13. Current Operations and Capital Improvements Appropriations Act of 2012, No. 2012-142, § 16.6(b), 2012 N.C. Sess. Laws 484, 616.

14. *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 3.

15. Michael Gordon, *His Sentence Carried No Jail Time. So Why Did He Keep Ending up There?*, THE CHARLOTTE OBSERVER (Nov. 11, 2017, 11:15 AM), <https://www.charlotteobserver.com/news/politics-government/article183866506.html> [<https://perma.cc/KE86-6KWL>].

16. *Id.*

17. Marcia Morey, *When Traffic Court Becomes Debtors’ Prison*, THE NEWS & OBSERVER (Apr. 24, 2016, 2:00 AM), <https://www.newsobserver.com/news/local/community/durham-news/dn-opinion/article72612127.html> [<https://perma.cc/A8PY-HUGC>].

judges. It is part of a campaign to strip the judiciary of its independence. You make judges jump through a lot of hoops and you let them know someone is watching them. It also can work to threaten their re-elections—claiming they are soft on crime. The listing of waivers granted is a clear message to judges that Raleigh has its eye on them. Someone in the legislature is keeping score. The purpose of the whole scheme is to intimidate judges. This is the clear politicization [of] our jobs.<sup>18</sup>

Lawmakers' explanations for the odd report were more benign, even if less persuasive. State Senator E.S. "Buck" Newton argued that:

If we see areas that have an unusually high amount [sic] of waivers, that might be useful for local justice officials to realize that they're out of what might be the normal range. That could be something the legislature might want to consider down the road if there appeared to be a problem. [The data is important] from a taxpayer's protection standpoint.

State Senate criminal justice fee proponent Shirley Randleman said the efforts to clamp down on waivers are "all about revenue."<sup>19</sup>

Judicial reaction to the shaming report was as likely anticipated. In 2017, the number of fee waivers fell by nearly half—from 87,006 in 2016 to 45,882 the following year. In 2018, the figure again fell precipitously, to just over 28,000. Judges no doubt got the message.<sup>20</sup>

Still, North Carolina legislators remained unsatisfied. In 2017, the legislature amended the fees law to prohibit any waiver unless "notice and an opportunity to be heard" was presented, by first class mail, to every government entity potentially receiving funds from court fees.<sup>21</sup> Potentially dozens or even hundreds of them—since the required linkage is unclear. According to Mecklenburg County Chief District Judge Regan Miller, "(this) provision is designed to make the process so cumbersome that judges will elect to not waive costs."<sup>22</sup> Judge Marcia Morey characterized the notice requirement as "tightening the screw to takeaway judicial discretion."<sup>23</sup> Cristina Becker, Criminal Justice Debt Fellow at the North Carolina ACLU, explained the likely results of the change:

To the judges that care about staying within the parameters of the Constitution, this will just clog up the courts; it will cost more money

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18. *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 2.

19. Joseph Neff, *No Mercy for Judges Who Show Mercy*, THE MARSHALL PROJECT (Nov. 29, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/11/29/no-mercy-for-judges-who-show-mercy> [<https://perma.cc/2JB7-FGWU>].

20. BECKER, *supra* note 3, at 14.

21. Current Operations Appropriations Act of 2017, No. 2017-57, § 18B.6.(a), 2017 N.C. Sess. Laws 248, 563.

22. Melissa Boughton, *House and Senate Differ over Budget Provision Making It Harder for Judges to Waive Fees for Poor Defendants*, NC POLICY WATCH (June 1, 2017), <http://www.ncpolicywatch.com/2017/06/01/house-senate-differ-budget-provision-making-harder-judges-waive-fees-poor-defendants> [<https://perma.cc/ZTY7-XYAV>].

23. Maura Ewing, *A Judicial Pact to Cut Court Costs for the Poor*, ATLANTIC (Dec. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/12/court-fines-north-carolina/548960> [<https://perma.cc/62G8-W5LD>].

for them, and I think it will cost more money than money that they would actually get back from poor defendants . . . And then for the other judges who have basically just assumed the role of collector of debt for the state will find this refreshing that there's an even better reason or another reason to not waive court costs.<sup>24</sup>

North Carolina's trial courts have high volume dockets. They disposed of over 1.6 million criminal and traffic cases in fiscal year 2016–17.<sup>25</sup> Mecklenburg County (Charlotte) estimated that the notice requirement would be triggered in thousands of cases a week—“a huge increase and burden on an office already overburdened.”<sup>26</sup> The notice rule also forces the court to schedule an additional hearing in the unlikely event that a notified entity chooses to appear. The Administrative Office of the Courts understated in claiming that the notice demand “poses numerous operational difficulties for our criminal courts.”<sup>27</sup> The notice requirement is believed to be the first of its kind in the country.<sup>28</sup>

The goal of the detailed findings requirement, the shaming report and the absurd notice standard is clear. The North Carolina General Assembly effectively tells the trial judges of the state: You have the power to issue waivers in cases of potent economic hardship, but if you use it, we will punish you. We will visit massive procedural hurdles upon you. We will publish your name on a blacklist that can be used against you come election time. If, on the other hand, you deny a requested waiver, we will smile, nod our studied approval, and let you go your way in peace. We thus place a thumb on the scales of justice. We do so for a reason. We don't want judges to grant waivers. Wise up, your honors, or pay the cost.

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24. Boughton, *supra* note 22.

25. *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 7.

26. *Id.* at 7–8.

27. JONATHAN HARRIS, N.C. ADMIN. OFFICE OF THE COURTS, NEW FEE WAIVER PROVISION IN THE 2017 APPROPRIATIONS ACT 4 (Nov. 13, 2017), [https://www.nccourts.gov/assets/documents/publications/Fee\\_Waiver\\_Memo\\_w\\_attachments.pdf?nx-KvQXSILwVJYRYbiGnnCo2gzDydb7s](https://www.nccourts.gov/assets/documents/publications/Fee_Waiver_Memo_w_attachments.pdf?nx-KvQXSILwVJYRYbiGnnCo2gzDydb7s) [<https://perma.cc/4RGA-536S>].

28. Neff, *supra* note 19; *see also Forcing Judges to Criminalize Poverty*, *supra* note 4, at 8. The North Carolina General Assembly's most recent change to the criminal court fees laws continues the apparent hostility to waiver. In November 2017, the Administrative Office of the Courts (AOC) launched a plan to ease the administrative burden on judges by sending a monthly blanket notice to all government entities who stood to receive funds from court fees. This proposed step would relieve judges from having to do the same in every case in which they were considering waiver. In January 2018, the AOC announced the creation of a central registry of government responses that would allow each agency to lodge a standing objection to waiver or to opt out of receiving notices in future, thus notably streamlining the process. The General Assembly was apparently dissatisfied with such procedural efficiency. So they required the legislative staff to investigate the AOC plan. This was initiated, according to Senator Warren Daniel, “to make sure” the AOC is “complying with the spirit of the provision.” As a result of this investigation, the lawmakers again modified the waiver provision in 2018. Beginning October 1, 2018, the AOC was required to submit an annual report, “on the implementation of the notice of waiver of costs to the government entities directly affected.” *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 9.

## II. Judicial Independence and Separation of Powers

I have little doubt that the North Carolina fee waiver scheme—the shaming and burdening regime—should be held to violate our constitutions, state and federal. Article I, Section 6 of the North Carolina Constitution states: “the legislative, executive and supreme judicial powers of State government shall be forever separate and distinct from each other.”<sup>29</sup> Article IV, Section 1 adds that the “General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government.”<sup>30</sup> Reasserting judicial integrity would be a good start.

Those provisions were given further elucidation just last year in *Cooper v. Berger*.<sup>31</sup> There, the North Carolina Supreme Court indicated that two types of legislative acts violate the separation of powers principle: when lawmakers exercise “power that the constitution vests exclusively in another branch,” or when they “prevent another branch from performing its constitutional duties.”<sup>32</sup> The waiver restrictions and impediments seem to violate the second norm. Judges are given a job to do, but they are hobbled by legislative interference from appropriately carrying it out. Judges have a constitutional duty to determine defendants’ ability to pay fines and fees and to waive costs if a defendant is indigent—rather than allowing them to be punished for their poverty.<sup>33</sup> The North Carolina General Assembly has boldly and repeatedly determined to make that necessary task harder to accomplish.

At least one notable federal constitutional precedent, however, strikes even closer to home. In 2003, the United States Congress passed the Feeney Amendment to the Sentencing Reform Act.<sup>34</sup> The goal of the change was to limit the growing tendency of federal judges to deviate from the then-mandatory federal sentencing guidelines. The Feeney Amendment aimed at “downward departures” by which a judge, upon considering mitigating factors, was permitted to hand down a shorter sentence than the guidelines instructed. Upward departures, curiously, were left unmolested.<sup>35</sup>

The Feeney Amendment forced federal judges to submit in writing the specific reasons for imposing a downward departure. It established a mechanism to scrutinize individual judges’ decisions—requiring courts to detail the basis for sentencing reductions and to include the offending judge’s name along with the sentence imposed to the Sentencing

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29. N.C. CONST. art. I, § 6.

30. N.C. CONST. art. IV, § 1.

31. *Cooper v. Berger*, 809 S.E.2d 98, 111 (N.C. 2018).

32. *Berger*, *supra* note 31, at 111 (quoting *State ex rel. McCrory v. Berger*, 781 S.E.2d 248, 256 (N.C. 2016)).

33. *See Bearden*, 461 U.S. at 660; *Turner v. Rogers*, 564 U.S. 431 (2011).

34. Enacted as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 [hereinafter PROTECT Act of 2003].

35. *Id.*



Commission.<sup>36</sup> In theory, the information was to be gathered only for data collection and exploration purposes. The Attorney General of the United States was also required to submit a report to the House and Senate Judiciary Committees describing any case presenting a downward departure, setting forth the facts of the case and the name of the presiding judge.<sup>37</sup> Shades of the North Carolina “shaming report.”

Feeney ignited a storm of protest. The Judicial Conference of the United States, the American Bar Association, current and former members of the U.S. Sentencing Commission, legal academics, and prosecutors and defense attorneys issued public denunciations of the amendment.<sup>38</sup> Critics cited the intimidation of judges as an egregious violation of judicial independence.<sup>39</sup> One antagonist held nothing back—calling the reporting requirement a “judicial blacklist” that directly infringes the appropriate separation of powers and the independence of the judiciary.<sup>40</sup> The late Senator Edward Kennedy called the demanded report “the latest salvo” in an “ongoing attack on judicial independence and fairness.”<sup>41</sup>

One federal judge, John S. Martin, resigned in protest.<sup>42</sup> Another deployed the “Statement of Reasons for Imposing Sentence” as a demanded desideratum:

Congress and the Attorney General have instituted policies designed to intimidate and threaten judges into refusing to depart downward, and those policies are working. If the Court were to depart, the Assistant U.S. Attorney would be required to report that departure to the U.S. Attorney, who would in turn be required to report to the Attorney General. The Attorney General would then report the departure to Congress, and Congress could call the undersigned to testify and attempt to justify the departure. This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart.<sup>43</sup>

Chief Justice William Rehnquist—a supporter of reduced downward departures—publicly castigated the amendment, calling it “an unwarranted and ill-considered effort to intimidate individual judges in

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36. PROTECT Act of 2003, Pub. L. No. 108-21, sec. 401(h), 117 Stat. 650, 672.

37. *Id.*

38. *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 14–15.

39. Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES (Dec. 8, 2003), <https://www.nytimes.com/2003/12/08/nyregion/new-york-s-federal-judges-protest-sentencing-procedures.html> [<https://perma.cc/YPQ4-WFTR>].

40. Alan Vinegrad, *The Judiciary’s Response to the PROTECT ACT*, 231 N.Y. L.J. 1 (2004).

41. Eric Lichtblau, *Justice Dept. to Monitor Judges for Sentences Shorter Than Guidelines Suggest*, N.Y. TIMES (Aug. 8, 2003), <https://www.nytimes.com/2003/08/08/us/justice-dept-to-monitor-judges-for-sentences-shorter-than-guidelines-suggest.html> [<https://perma.cc/N6J8-DP4H>].

42. *Forcing Judges to Criminalize Poverty*, *supra* note 4, at 15; *see also* Lichtblau, *supra* note 41 (“John S. Martin, a federal district judge in Manhattan who announced in June that he would retire in part because he saw the judiciary’s independence as threatened, said the Justice Department policy was ‘based on the erroneous premise that a lot of judges around the county are just going off the reservation.’”).

43. *United States v. Kirsch*, 287 F. Supp. 2d 1005, 1006–7 (D. Minn. 2003).



the performance of their judicial duties.”<sup>44</sup> Rehnquist explicitly worried over the Feeney Amendment’s threat to judicial independence and its introduction of politics into judicial decisionmaking.<sup>45</sup>

The U.S. Supreme Court as a whole never directly addressed Feeney’s constitutional propriety. A federal district court did, though, in *U.S. v. Mendoza*.<sup>46</sup> There, the judge ruled that the reporting requirement, though not giving Congress direct power over the federal judiciary, posed a “threat, real or apparent, (that) is blatantly present.”<sup>47</sup> There is “no legitimate purpose served by reporting an individual judge’s performance to Congress,”<sup>48</sup> the Court declared. The Amendment, instead, constituted a “power grab by one branch of government over another branch.”<sup>49</sup> As a result, it was deemed to present an “unwarranted interference with judicial independence and a clear violation of the separation of powers set forth in the United States Constitution.”<sup>50</sup> The court didn’t seem to think it was close call.

### Conclusion

The Feeney Amendment was effectively rendered moot by the Supreme Court’s decision declaring the relevant components of the Sentencing Guidelines advisory rather than mandatory.<sup>51</sup> But the inappropriately intrusive Feeney Amendment tracks the North Carolina “shaming report” in telling ways. As with Feeney, North Carolina judges are required explain and support their waivers in writing. Judges are then forced to share that information with the legislature, and the population at large. An assumedly unpopular determination (granting waiver to an impoverished criminal defendant) is publicly linked to judges subject to political or electoral retaliation. Legislators no doubt believe this will intimidate judicial “generosity.” It also surely deters constitutional compliance and judicial independence. Judges attest that the reporting regime has a stifling effect on their decisionmaking. Waiver data bears the suspected suppression out. Judges who waive court fees are punished with administrative burden and political risk. Those who deny waivers are left unhindered. A potent hand is thus placed on the scale of justice. Unsurprisingly, today, in North Carolina, the intervention is directed at the poor and vulnerable, and any judge who might seek to assure constitutional parity. Equal justice under law again requires a qualifying asterisk.

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44. *Rehnquist Criticizes Sentencing Restrictions*, L.A. TIMES (Jan. 2, 2004), <https://www.latimes.com/archives/la-xpm-2004-jan-02-na-rehnquist2-story.html> [<https://perma.cc/KF5E-THUS>].

45. Susan R. Klein & Sandra Guerra Thompson, *DOJ’s Attack On Federal Judicial “Leniency,” The Supreme Court’s Response, and the Future of Criminal Justice Sentencing*, 44 TULSA L. REV. 519, 544 (2009).

46. *United States v. Mendoza*, No. CR 03-730 DT, 2004 U.S. Dist. LEXIS 1449.

47. *Id.* at 19.

48. *Id.*

49. *Id.*

50. *Mendoza*, *supra* note 46, at 21.

51. *United States v. Booker*, 543 U.S. 220 (2005).