Inability to Pay: Court Debt Circa 2020

Judith Resnik
David Marcus

Follow this and additional works at: https://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

This Essays is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
INABILITY TO PAY: COURT DEBT CIRCA 2020

JUDITH RESNIK** & DAVID MARCUS***

Commitments to “access to justice” abound. So do economic barriers that undermine that premise. Fees, costs, fines, money bail, and other financial assessments—levied by courts, jails, and prisons—have become commonplace features of state and federal civil and criminal law enforcement.1

Yet the challenges of funding courts and the harms of debt generated through interactions with the legal system have not yet become staples of law school teaching and scholarship. This mini-symposium is one of many efforts to bring to the fore the failures of law to make good on its promises of open courts and equal treatment of civil disputants and criminal defendants. The Essays that follow contribute to a growing literature mapping the impact of

---

court and prison debt. This mini-symposium, in turn, offers law teachers and students a window into the breadth of research, litigation, legislation, and legal analyses aiming to understand and to stop what have become regressive tax systems that are produced by virtue of court-based fees, fines, assessments, and money bail.

Before detailing more about the Essays that follow, context is needed to show the links between the academy—focused on teaching about courts, procedure, bankruptcy, and criminal law enforcement—and the problems of courts and of the people using them. During the second half of the twentieth century, political and social movements brought into sharp relief inequalities and subordination based on race, class, gender, and many other status markers.2 Activism and scholarship pushed courts and legislatures to recognize a host of rights and entitlements, ranging from protections of criminal defendants and prisoners to habitable housing, government benefits, and fair treatment in interactions with the state.3

Courts and legislatures responded in some instances with new doctrines and statutes addressing individuals interacting with criminal law enforcement systems, people seeking housing, recipients of federal benefits, and individuals harmed by various kinds of discrimination. While the United States Supreme Court declined to recognize poverty as a suspect classification,4 it relied on an alchemy of due process and equal protection to recognize the need to provide resources for some low-income individuals when in conflict with the state.5

As a result, legal mandates require that, in some cases, states provide lawyers to indigent criminal defendants and, on rare occasions, to civil litigants; further, under certain circumstances, courts have to waive fees and subsidize transcripts and experts.6 In addition, Congress created the Legal Services Corporation and authorized fee shifting to encourage the pursuit of civil rights


3. One example is Charles Reich’s analysis in The New Property, 73 YALE L.J. 733 (1964), which framed a sequence of efforts to establish rights to security and well-being and helped to generate entitlement theory that created some buffers through procedural safeguards to the termination of government licenses and benefits. See also Judith Resnik, The Story of Goldberg: Why This Case Is Our Shorthand, in CIVIL PROCEDURE STORIES 473, 503–06 (Kevin M. Clermont ed., 2d ed. 2008).


claims. Both legislatures and courts shaped class actions and other forms of aggregation to permit cost sharing among litigants and to provide incentives for lawyers to represent groups. Moreover, the U.S. Supreme Court concluded that, rather than incarcerating people who lacked resources to pay fines, a hearing was required to inquire about their ability to pay.

During the last several decades, some of the efforts to facilitate access to courts have been cut back through changes in statutes and in judicial interpretation. State and federal prosecutorial efforts have expanded, and the country has had economic downturns. Many jurisdictions have tried to pass the costs associated with courts, policing, and detention on to individuals. Instead of responding through raising or reallocating general revenues or by altering policies, states and the federal government have produced a welter of fees and payback obligations.

“Court debt” has become one shorthand for obligations incurred from many sources, including administrative fees, money bail, punitive fines, and victim restitution charges, as well as charges for transcripts, public defenders, detention on arrests, diversion programs, monitoring in lieu of bail, and incarceration. In some jurisdictions, judges have become partners with law enforcement in what could sadly be termed a joint “fundraising” endeavor that treats individuals charged with offenses and infractions as sources of revenue instead of as needing to be helped and heard by law. For example, localities...
have assessed “registration fees” for a “free” public defender. Some jurisdictions seek recoupment of the costs of both lawyers and trials after an individual is convicted. And, as the United States Supreme Court detailed in Nelson v. Colorado, not all jurisdictions return the assessments when individuals are acquitted.

One focus of the burgeoning literature is on the costs imposed through criminal law enforcement. Another is on civil litigants facing a barrage of special fees, surcharges, and assessments. For example, in the federal courts, the decision to waive filing fees is not based on a uniform standard calibrated to national guidelines on income but on the local practices of the district in which litigants allege they cannot afford to pay fees. And, in some states, defendants obliged to reply to a lawsuit are also charged to file in court. Another category of cases relates to immigrants. Detention in the “civil” immigration system reflects individuals’ resources. Immigrants held in detention during the pendency of their asylum or removal proceedings may not be able to afford bonds, if they are set at all.

An aggregate picture of the different sources of “legal financial obligations” (“LFOs”) comes from an impressive array of empirical evidence that attends to the racial inequalities and that has documented how fees assessed, bail imposed, and debt associated with the legal system put individuals, families, and communities into cycles of poverty and punishment. In some jurisdictions, driver’s licenses can be suspended because of unpaid court recognized incentives to impose charges. See Timbs v. Indiana, 139 S. Ct. 682, 689 (2019); see also United States v. Basurto, 117 F. Supp. 3d 1266, 1287 n.6 (D.N.M. 2015) (discussing the incentives that arise when court budgets depend on the fees that they can assess defendants).

16. Id. at 1252–54.
20. Hernandez v. Sessions, 872 F.3d 976, 981–82 (9th Cir. 2017). The decision enjoined the practice in the Central District of California of setting bonds for detained immigrants without an inquiry into ability to pay. Id.
debt; in others, voting rights can be cut off. The impact of such practices is felt most acutely by people with limited resources and by communities of color, either because they seek assistance from the legal system or because they are subjected to over-policing, prosecution, and punishment. Moreover, rather than serving to improve public safety, court-imposed financial obligations result in locking people out of participating in programs aimed at rehabilitation. As a result, interactions with courts can lead to more social dislocation and crime.

Vivid examples of the injuries have been encapsulated in the sad shorthand of “Ferguson,” which made national headlines in 2015. Ferguson was not sui generis. Activists, researchers, members of the media, a host of local, state, and national bar associations, judicial task forces, translocal organizations of government actors, and litigators have now detailed how LFOs undermine fair and just decisionmaking. In response, commitments to change egregious


25. See FERGUSON REPORT, supra note 12, at 1–2; see also Consent Decree at 1–2, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016).

practices have grown. New legislation and administrative actions have resulted in significant proposals for and, in some instances, enacted reforms that include limiting or ending the assessment of fees and abolishing money bail.

The research and legislation have also helped to produce new case law. In 2019, the United States Supreme Court concluded in a case in which a person convicted under state law faced the forfeiture of his car that the Excessive Fines Clause of the Eighth Amendment applied to the states. An amalgam of due process and equal protection analyses have prompted lower courts to hold unconstitutional the automatic suspension of driver’s licenses, the imposition of money bail for those unable to pay, the fees levied by judges who benefit


from their assessment, and the setting of bond amounts for immigrants without an inquiry into ability to pay.

That backdrop makes plain the contributions of the Essays that follow. Money bail is the focus of discussions by Paul Heaton, Brandon Buskey, and Gloria Gong. Heaton’s research on the “downstream” consequences of being held in jail rather than released before trial has been central to litigation challenging money bail systems. In his Essay, Heaton surveys how empirical studies have documented that pretrial detention puts a person at greater risks of conviction, loss of job, loss of child custody, and future prosecution.

Further, as Buskey explains, “affordable bail” is often an oxymoron, as the amounts imposed do not reflect individuals’ ability to pay. Moreover, Buskey underscores how “risk assessment tools” are used to justify detention of individuals who, even on those metrics, are very unlikely to miss court dates or commit a violent offense.

Gong, based at the Kennedy School at Harvard University, details how the Government Performance Lab (“GPL”) provides advice to localities about how to implement bail reforms effectively. Over-supervision and the lack of provision of services can undercut individuals’ capacity to succeed once released. The GPL aims to advise governments on how to invest wisely in new programs that are sustainable.

Jeffrey Selbin documents the assessments imposed by counties in California on parents of children held in detention. His Policy Advocacy Clinic, based at UC Berkeley, exposed the perverse outcomes that the millions of dollars in these assessments have had, in terms of recidivism for young offenders and family disunity. Families of color have borne a disproportionate amount of the suffering. As Selbin’s Essay describes, the clinic convinced the
state to preclude counties from imposing such charges. The clinic has also succeeded in having some counties waive the debt owed.

An Essay by Pamela Foohey highlights the intersection between court debt and the bankruptcy system. Foohey describes the limited pathways that individuals can pursue in order to discharge court debt in bankruptcy. Drawing upon large empirical studies, she explains how disparities in access to meaningful discharge can entrench racially disparate aspects of the court-debt problem.

Cortney Lollar’s contribution shows how debt subordinates and marginalizes low-wage earners, who are disproportionately members of communities of color. Further, she traces the evolution of debtors’ prisons and explains how, as debt obligations have mounted, constitutional protections against imprisonment for nonpayment have waned.

Many of us who teach about courts provide an idealized version of what the constitutional and procedural rules require. Given the impact that courts can have in shaping people’s lives, the purpose of bringing together law professors from different fields at the American Association of Law Schools’ annual meeting and of this set of Essays is to bring into our classes and resources the structure of courts and the experiences of the users of courts. Whether by reading case law, exercises such as drafting in forma pauperis applications, or through articles such as those in this mini-symposium, teachers of law can help students and the public understand both the impressive research and reforms of the last few years and the need for more. Given the pervasive use of fees and fines to fund court processes, the questions that ought to preoccupy us all are whether and how constitutional democracies can meet their obligations to make justice accessible. Our hope is that, through symposia such as this one, the costs imposed by courts will become part of mainstream discussions in law schools. The invitation to readers is to use this commentary as an entry point into thinking, teaching, and writing about how to make the legal system live up to the constitutional aspirations for fairness, justice, and equality.