

2017

# Trends in State Courts



Fines, Fees, and  
Bail Practices:  
Challenges and  
Opportunities



[www.ncsc.org](http://www.ncsc.org)



## Board of Directors—National Center for State Courts

**Hon. John D. Minton, Jr.** Chief Justice, Supreme Court of Kentucky, Chair

**Arthur W. Pepin** Director, Administrative Office of New Mexico Courts, Vice-Chair

**Hon. Maureen O'Connor** Chief Justice, Supreme Court of Ohio, Chair-Elect

**Callie T. Dietz** State Court Administrator, Administrative Office of Washington Courts, Vice Chair-Elect

**Mary Campbell McQueen** President, National Center for State Courts, Williamsburg, Virginia

**Hon. Jerome B. Abrams** District Court Judge, Hastings, Minnesota

**Hon. Ronald B. Adrine** Presiding Judge, Municipal Court, Cleveland, Ohio

**Elena R. Baca, Esq.** Paul Hastings, Los Angeles, California

**Hon. Jennifer D. Bailey** Circuit Court Judge, 11th Judicial Circuit, Miami, Florida

**Hon. Stephen H. Baker** Judge, Superior Court, Shasta County, California

**Luther J. Battiste III, Esq.** Johnson, Toal & Battiste, Columbia, South Carolina

**Matthew L. Benefiel** Court Administrator, 9th Judicial Circuit, Orlando, Florida

**Deborah J. Daniels, Esq.** Krieg Devault, Indianapolis, Indiana

**Randall M. Ebner** Vice President and General Counsel, Exxon Mobil Corp., Irving, Texas

**Hon. David Gilbertson** Chief Justice, Supreme Court of South Dakota

**Patricia W. Griffin** State Court Administrator, Supreme Court of Delaware

**Michael Harrington** Senior Vice President & General Counsel, Eli Lilly and Company, Indianapolis, Indiana

**Stephanie E. Hess** Director of Court Services, Supreme Court of Ohio

**Hon. Elizabeth P. Hines** Judge, 15th District Court, Ann Arbor, Michigan

**Sally A. Holewa** State Court Administrator, Supreme Court of North Dakota

**Simon M. Lorne, Esq.** Vice Chairman & Chief Legal Officer, Millennium Management, New York, New York

**Hon. Gary W. Lynch** Judge, Court of Appeals, Springfield, Missouri

**Anne M. Milgram** Distinguished Scholar in Residence, NYU School of Law, New York, New York

**Dan Mozena** U.S. Ambassador (ret.), Silver Spring, Maryland

**Hon. Paul L. Reiber** Chief Justice, Supreme Court of Vermont

**Clifford M. Sloan, Esq.** Skadden, Arps, Slate, Meagher & Flom, Washington, D.C.

**Todd A. Smith, Esq.** Power Rogers & Smith, Chicago, Illinois



2017

# Trends in State Courts

Fines, Fees, and Bail Practices: Challenges and Opportunities



Edited by:

**Deborah W. Smith**  
Managing Editor

**Charles F. Campbell**

**Blake P. Kavanagh**



[www.ncsc.org](http://www.ncsc.org)



*This report is part of the National Center for State Courts' "Report on Trends in the State Courts" series. Opinions herein are those of the authors, not necessarily of the National Center for State Courts.*

Copyright 2017  
National Center for State Courts  
300 Newport Avenue  
Williamsburg, VA 23185-4147  
Web site: [www.ncsc.org](http://www.ncsc.org)  
ISBN: 978-0-89656-308-7

### **Suggested Citation**

D. Smith, C. Campbell, and B. Kavanagh. *Trends in State Courts 2017*  
(Williamsburg, VA: National Center for State Courts, 2017).

## 2017 Review Board and Trends Committee

*Trends in State Courts 2017* articles have been through a rigorous review process. The members of the 2017 Review Board and Trends Committee have provided valuable feedback on this edition. The patience and commitment of the Review Board and Trends Committee are greatly appreciated:

**James L. Adams** Trial Court Administrator, 1st Judicial District, Oregon (ret.)

**Howard H. Berchtold, Jr.** Trial Court Administrator, Atlantic City, New Jersey

**Thomas M. Clarke** Vice President, Research and Technology, National Center for State Courts

**Elizabeth Evans** Chief of Court Operations, Superior Court of California, County of San Mateo

**Peter Kiefer** Deputy Court Administrator, Maricopa Superior Court, Arizona

**Laura G. Klaversma** Court Services Director, National Center for State Courts

**Karen Kringlie, Esq.** Director of Juvenile Court, Admin Unit Two, Fargo, North Dakota

**Brian J. McLaughlin** Adjunct Faculty, Department of Public Administration, Villanova University

**Neil Nesheim** Area Court Administrator, First Judicial District, Juneau, Alaska

**Rory Perry** Clerk of Court, Supreme Court of Appeals, West Virginia

**Beth S. Riggert** Communications Counsel, Supreme Court of Missouri

**Alyce Roberts** Special Projects Coordinator, Alaska Court System

**Hon. John J. Russo** Presiding and Administrative Judge, Cuyahoga County Court of Common Pleas, Ohio, General Division

**Alison H. Sonntag** Chief Deputy Clerk, Kitsap County Clerk's Office, Washington

**Robert D. Wessels** County Court Manager, County Criminal Courts at Law, Houston, Texas (ret.)

## Acknowledgments

*Trends in State Courts 2017* was truly a team effort. Without the support and dedication of the court community this publication would not have been possible.

The editors would like to thank VisualResearch, Inc.—Neal B. Kauder and Kim Small—for data presentation, design, and printing of *Trends*.



The *Trends in State Courts 2017* editorial staff also recognize Thomson Reuters for their ongoing provision of online legal resources and research support.



## Knowledge and Information Services Staff

**Jesse Rutledge** Vice President, External Affairs

**David C. Hartt** Director, KIS

**Dana Deseck-Piazzon** Librarian

**Gregory S. Hurley** Senior KIS Analyst

**Blake P. Kavanagh** KIS Analyst

**William E. Raftery** Senior KIS Analyst

**Deborah W. Smith** Senior KIS Analyst

**Cheryl L. Wright** Program Specialist

## Table of Contents

Preface <b>Mary Campbell McQueen</b>	1
How the Fines and Fees Issue Impacted the Missouri Courts <b>Hon. Karl A. W. DeMarce</b>	2
The Third Generation of Bail Reform <b>Timothy Schnacke</b>	8
The Role of Courts in Eliminating the Racial Impact of Criminal Justice Debt <b>Larry Schwartztol</b>	14
Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees <b>Andrea M. Marsh</b>	20
Bail Reform in New Jersey <b>Hon. Stuart Rabner</b>	27
Controlling the Message in Times of Court Challenges <b>Beth S. Riggert</b>	30
View from the Michigan Bench <b>Hon. Elizabeth Hines</b>	35
View from the Texas Bench <b>Hon. Ed Spillane</b>	41
ReTooling <i>CourTools</i> : Legal Financial Obligations and the New Measure 7 <b>Richard Schauffler and Brian Ostrom</b>	44
Arizona's Task Force on Fair Justice for All <b>Hon. Maria Elena Cruz</b>	48
The Problem with Making Children Pay for Probation Supervision <b>Mary Ann Scali and Hillela Simpson</b>	55
The Work of the National Task Force on Fines, Fees and Bail Practices <b>Hon. Maureen O'Connor and Laurie K. Dudgeon</b>	59





## Preface

**Mary Campbell McQueen** President, National Center for State Courts

People who come to court for routine infractions, such as traffic violations, usually expect to pay a fine. But courts often assess extra fees, which may fund not only processes related to the original infraction, but also other activities. This is a legitimate method for funding court operations.

However, the U.S. Department of Justice's investigation into the relationship between law enforcement, the courts, and the citizens of Ferguson, Missouri revealed an alarming problem—the impact of increasing court fines and fees, along with additional sanctions for nonpayment, on the poor. This problem is not unique to Ferguson. Low-income offenders in many towns and cities are faced with paying fines and fees they simply cannot afford, often leading to even more fees and late charges. Nonpayment can lead to driver's license suspensions and even to incarceration. In some cases, people convicted of violating a minor infraction, for which only a fine and no jail time is a penalty, end up going to jail anyway because they cannot afford to pay the fine or are chronically late in making payments.

It is difficult to hold a job in the United States without a driver's license; it is impossible while in jail. This has led to what the Conference of State Court Administrators described as “debtors’ prisons” in a 2015-16 policy paper.

No one is arguing that offenders should not be held accountable for their actions, but there must be a balance between the needs of offenders and societal interests on public safety and appropriate punishment for deterring criminal or reckless behavior. In 2016 the Conference of Chief Justices and Conference of State Court Administrators formed the National Task Force on Fines, Fees and Bail Practices to address the impact of court-ordered financial obligations on low-income communities. Many state and local courts are working to achieve this balance by assessing an offender's true ability to pay, waiving fees when necessary, and providing for payment plans or community service in lieu of payment.

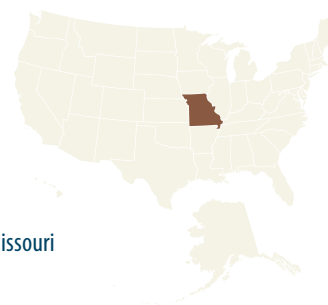
Therefore, the focus of the 2017 edition of *Trends in State Courts* is “Fines, Fees, and Bail Practices: Challenges and Opportunities.” Several articles address what states and municipalities are doing to confront the effect of fines, fees, and bail practices on the poor. For example:

- risk assessment in New Jersey to determine whether offenders pose a real threat to public safety;
- principles and recommendations by the Arizona Task Force on Fair Justice for All; and
- reforms in Missouri to refocus municipal courts on the purposes of the justice system and not just on an offender's ability to pay fines and fees.

Other articles provide a more national view of fines, fees, and bail practices. Readers will learn about the history of bail reform in the United States, the issues surrounding supervision fees for children on probation, the racial impact of criminal justice debt, and how NCSC's revised Measure 7 in *CourtTools* can help courts assess their practices for imposing and enforcing court-ordered financial obligations.

It is heartening to see what states are doing to confront this issue, as these activities are crucial to increasing public trust and confidence in our nation's courts. I hope that this year's *Trends* will enlighten readers in their work to improve fine and bail practices in their states.

# How the Fines and Fees Issue Impacted the Missouri Courts



**Hon. Karl A. W. DeMarce**

Associate Circuit Judge, Circuit Court of Scotland County, Missouri

Some Missouri municipalities have operated their police departments and municipal courts in a manner designed primarily to maximize revenue from fines and fees. Reforms are now being undertaken to refocus the municipal courts upon the legitimate purposes of the justice system, with consideration given for an offender's ability to pay.

Fines are the most common penalty for violations of municipal ordinances in Missouri. For many violations, fines are the only authorized penalty. Whether an offender is granted probation or is sentenced to pay a fine or to serve jail time, a variety of court costs, fees, and surcharges are typically assessed.

Courts confront a difficult balancing of interests when assessing and collecting fines and fees. The constitutional rights of alleged violators and adjudicated offenders must be safeguarded by an independent judiciary. The essential purposes of maintaining public peace and safety, providing punishment, and deterring unlawful activity must be accomplished. Due consideration must

be given to ability to pay to avoid disproportionate impacts on low-income persons. Improper considerations of generating revenue for governmental entities should not be permitted to influence judicial decision making.

## The Situation in Missouri

Regrettably, the design of Missouri's municipal courts makes them highly susceptible to pressure to maximize the revenues derived from fines and fees. Fine monies arising from municipal ordinance violations are not disbursed in the same manner as for state law criminal offenses. Missouri's constitution has long required that all fines and forfeitures from state law violations go to the

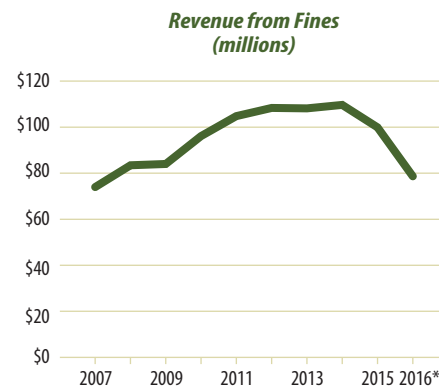
state's school funds. Neither law enforcement nor the courts can benefit directly from fine monies resulting from state law criminal charges.

However, a different policy choice was made when it came to municipal fines. Instead of adequate provision being made for law enforcement, courts, and other city operations to be funded solely from general revenue, the cities were allowed to keep the fines and forfeitures arising from ordinance violations. And this situation prevails in conjunction with the fact that, in the vast majority of instances, the governing bodies of the cities themselves hire and supervise not only their own executive-branch personnel—the police and prosecutors—but also their judicial-branch personnel. These people include municipal judges, many of whom are part-time and maintain private law practices, and clerks of court, most of whom perform some “executive-branch” duties in addition to court-related work.

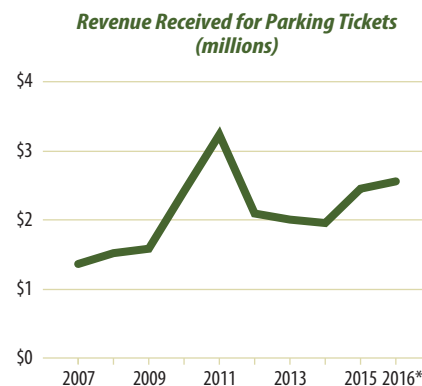
Thus were created both the conditions and the incentives under which misconduct, corruption, and abuse could thrive. The great majority of Missouri's municipal courts resisted this temptation and, in fairness to many honorable and conscientious judges and lawyers, operated in a manner largely above reproach. Still, there remained a few dozen municipalities—many in the St. Louis area, but also some scattered across the state—that succumbed to the temptation to use their police and their municipal courts primarily to generate additional revenue.

The Great Recession of the last decade saw the tax-based revenue sources of many cities dwindle, even as their responsibilities and expenses increased. This was particularly true of many cities that have lost tax base and economic activity in recent decades, including many of the smaller municipalities in northern St. Louis County. Some of these cities turned to their law enforcement and their municipal courts, seeking additional revenues for city

operations (see data on St. Louis area municipal revenue sources collected in C. Gordon and C. R. Hayward, “The Murder of Michael Brown,” *Jacobin*, August 9, 2016, online at <https://tinyurl.com/zq88qzb>). Ferguson, Missouri, was one such community where law enforcement and the courts faced pressure to increase municipal court revenues, as documented in a March 2015 U.S. Department of Justice report.



\* Most current data from the Missouri Statewide Municipal Division (may be updated before publication).



\* Most current data from the Missouri Statewide Municipal Division (may be updated before publication).

Ferguson, however, was not an isolated example. All revenues collected in Missouri “stand-alone” municipal divisions increased substantially between 2007 and 2014.<sup>1</sup> Municipal fines collected statewide in “stand-alone” municipal courts increased from \$73,963,030.27 to \$109,656,918.94—more than 48 percent in only eight years.

<sup>1</sup> The “stand-alone” municipal divisions operate their own courts to hear municipal-ordinance-violation cases, providing their own municipal judge (or, in some instances, using a state court judge), as well as clerical staff, court facilities, case management, accounting, recordkeeping, etc. As of July 1, 2016, there were over 460 municipal divisions of this type in Missouri.

However, there are also many municipalities (140 as of July 1, 2016) that refer their municipal-ordinance-violation cases to the state circuit courts, as authorized by the state constitution and state statutes. In these divisions, the cases are handled as municipal cases, but are heard in the state courts by state court judges and processed by state court clerical personnel. Several additional cities are now actively considering this option for handling their municipal-ordinance-violation cases.

# Trends in the U.S.

## Supreme Court of Ohio Bench Card

In 2014 the Ohio Supreme Court released a bench card about the collection of fines and court costs in adult trial courts. The bench card aimed to both educate and serve as a resource guide to all Ohio judges to ensure the proper imposition, management, and collection of financial sanctions.

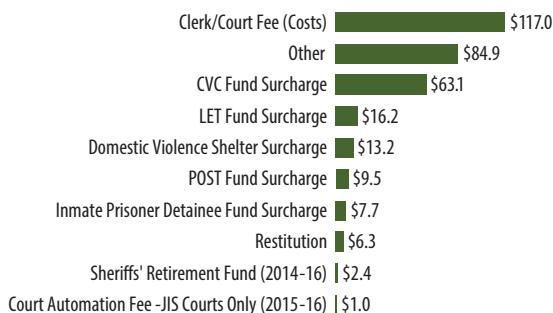
See “The Supreme Court of Ohio’s Collection of Fines and Court Costs in Adult Trial Courts,” at <https://tinyurl.com/ktppn9c>.



The Missouri judiciary’s annual statistical reports indicate that between fiscal years 2009 and 2013, the number of reported new case filings in these courts statewide increased by over 241,000 cases, or more than 17.5 percent, over five years.

A few dozen municipalities have seen egregious abuses of authority by both law enforcement and the courts. These have included grossly excessive numbers of tickets being written; tickets with, at best, a marginal connection to public peace and safety; the operation of low-budget, part-time courts in inadequate facilities, with poorly trained staff and insufficient recordkeeping systems and practices; excessively high fines and court costs, with costs and surcharges not even authorized by law; and oppressive and, at times, unconstitutional practices for collecting fines and fees assessed to municipal defendants, often with little or no regard to an individual’s ability to pay. These practices have had the most severe impacts upon low-income persons, including many of racial and ethnic minority backgrounds.

### Revenue Collection Sources Totals, 2007-16\* (millions)



\* Most current data from the Missouri Statewide Municipal Division (may be updated before publication).

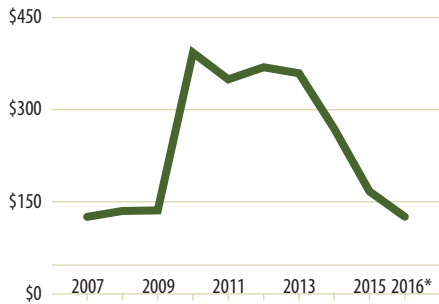
The fatal shooting of Michael Brown, Jr., by Ferguson police officer Darren Wilson on August 9, 2014 focused unprecedented scrutiny upon Ferguson, upon Missouri, and specifically upon Missouri’s limited-jurisdiction municipal courts. Since August 2014, there has been close, continuing, and, for the most part, exceedingly negative attention given to Missouri’s municipal court system by the press, primarily in the St. Louis area, and from national and international news media.

## The Call for Reform

Pressure for change has come from multiple directions. In both 2015 and 2016, the Missouri General Assembly passed major legislation requiring reform of municipal courts and specifically limiting collection and enforcement of fines and fees. Among the many provisions in these laws, maximum authorized fines were reduced for many offenses; courts were required to consider ability to pay and to permit installment payment plans; and fees connected with the performance of community service were prohibited. The amount of revenue cities could derive from municipal fines was reduced from 30 percent to 12.5 percent in St. Louis County and to 20 percent elsewhere in the state. Under the legislation, cities that exceeded the revenue limits could face significant consequences, including loss of other revenues and a public vote on disincorporation.



**Revenue Retained for Judicial Education Fund (JEF)  
(thousands)**



\* Most current data from the Missouri Statewide Municipal Division (may be updated before publication).

The Missouri State Auditor's Office has become much more aggressive in reviewing municipal court operations, and it looks closely at whether the revenue percentage limits have been exceeded. Recent auditor's reports have harshly criticized the financial management of several municipal divisions and the collection of unauthorized costs and fees by certain jurisdictions.

Change has also come through litigation. Several Missouri cities have been sued for violating constitutional rights through their enforcement of court financial obligations and for assessment of unauthorized costs and fees. Some of these lawsuits have led to large financial awards against individual cities and to consent decrees in which cities have agreed to substantial restrictions upon the use of judicial authority, limiting their power to enforce their own judgments. Other cases, including one brought against 13 St. Louis area municipalities, remain pending as of this writing. These cases are typical of many others now pending in various places throughout the United States in which courts are being accused of operating *de facto* "debtor's prisons" to enforce judgments for fines and costs, often without regard to an offender's ability to pay.

Meanwhile, the courts themselves have worked diligently toward reform. The current and immediate past chief justices of Missouri have used major public addresses to emphasize the importance of courts not being used as "revenue generators" for local governments and to highlight work being done internally to improve the performance of the municipal divisions.

# Trends in the U.S.

## Michigan Supreme Court Ability to Pay Checklists

In 2015 the Michigan Supreme Court State Court Administrative Office's Ability to Pay Workgroup issued its Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay. Appendix A is an Ability to Pay Checklist to assist judges with determining which factors to consider when placing the appropriate findings on the record regarding ability to pay.

See "Appendix A Ability to Pay Checklists,"  
<https://tinyurl.com/mtys4t>.



The Supreme Court of Missouri has acted to address concerns. Early on, the court enlisted the National Center for State Courts (NCSC) to perform a detailed study of the Ferguson Municipal Court with recommendations for needed improvements. After further study and investigation, NCSC prepared a report of "Best Practices Recommendations" for statewide consideration.

In May 2015 the court established its own Municipal Division Work Group to make an independent and candid study of a wide range of issues concerning municipal courts. After nearly ten months of intensive study and three public hearings, the work group produced a comprehensive report, which was not intended to please, or appease, any of the political players with an interest in these issues; rather, the report identified and addressed the underlying economic incentives and legal structures that have permitted and encouraged corrupt and abusive practices in some of the municipal divisions. Perhaps foremost among the transformative recommendations in the report was that all municipal fines and forfeitures should be directed to the school funds of the state, as the Missouri Constitution already requires for state law violations. Although the legislature has not yet taken such a dramatic step, the work group report has stimulated increased discussion about this concept among state legislators.



The Supreme Court of Missouri took further steps to improve matters relating to fines and costs in the municipal divisions. Rule 37.65 was amended effective July 1, 2015, to emphasize the importance of inquiring as to a defendant's ability to pay, requiring the availability of installment plans for payment of fines and costs, and requiring strict compliance with due process before an individual can be detained in response to nonpayment.

In September 2016, the supreme court promulgated a model local court rule to assist the municipal divisions in making indigency determinations. At the same time, the court published its first "Minimum Operating Standards" for the municipal divisions, providing guidance to the courts and to the presiding circuit judges, who have supervisory responsibility over these courts in each judicial circuit. These standards include clear directives requiring inquiry about ability to pay; forbidding the assessment of unauthorized fines and fees; requiring the availability of installment payment plans; prohibiting the assessment of costs against indigent persons; authorizing the use of community service as an alternative to fines and fees and prohibiting the assessment of fees connected to the performance of community service; requiring strict compliance with due process before an offender can be detained for nonpayment; and directing the courts to pursue new technologies, making it more convenient for the public to obtain current information about their cases and to remit payments online.

Through the "Show-Me Courts" initiative, and with the assistance of a recent grant from the U.S. Department of Justice, the supreme court is investing greater resources in improved case management technologies. These technologies will improve the accessibility and convenience of the municipal divisions. A recently added feature, "Track This Case," enables individuals with cases in courts using the state case management system to sign up for email notifications of court appearances and payment-plan dates.

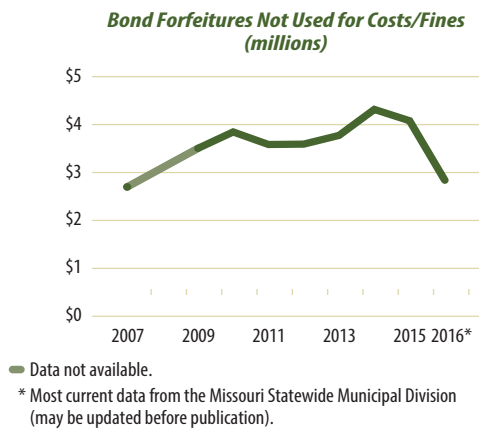
It is hoped that this will reduce the number of missed appearances and, thus, the number of warrants issued. These applications should be made available to many more municipal courts over the next few years.

Substantial efforts by the state judiciary, the Missouri Association of Municipal and Associate Circuit Judges, the Missouri Association for Court Administration, the Missouri Municipal Judge Education Committee, and the Missouri Municipal Clerk Education Committee are in progress to improve training for municipal judges and court clerks and to enforce compliance with continuing-education requirements for municipal judges. In addition to these state-level efforts, many municipal judges in the St. Louis metropolitan area have formed their own Municipal Court Improvement Committee to improve court-operating practices at the local level. Many cities have recalled large numbers of outstanding warrants related to older violations and to delinquent fines and fees.

## The Future of Reform

Issues relating to fines and fees will continue to impact Missouri's courts. A legal and political culture, which has developed over several decades, cannot be changed overnight, and rare is the "reformation" that fails to prompt a "counter-reformation." Even as recently adopted reforms are now being implemented, the political aspects of these issues remain very much with us.

Municipal governments continue to face difficult economic pressures, with few options for seeking new revenues to support basic services. Municipal case filings and court revenues have declined significantly over the past two years. Reduced collections of fines and court fees will force budgetary reductions in many cities, unless the lost revenues can be offset from other sources. However, the political environment in most communities remains hostile to imposing new or increased taxes, particularly for general revenue purposes.



The cities are already exerting pressure upon the state legislature to roll back the recent statutory reforms. Many in law enforcement and city government now contend that the lower ranges of punishment, coupled with the procedural restrictions on enforcement of fines and costs, have not only negatively impacted municipal budgets, but also effectively eliminated any meaningful deterrent against violation of municipal ordinances. Bills have been pre-filed for 2017, seeking to eliminate the prohibition on the charging of fees associated with community service and to increase the base municipal court costs. Additional legislative proposals to undo the reforms of 2015 and 2016 are anticipated.

Moreover, the legislative branch sometimes sends mixed signals. Only one year before adopting the major municipal court reform legislation restricting the authorized amounts of fines for many ordinance violations, the Missouri General Assembly had passed a major overhaul of the state criminal code. This legislation, which went into effect January 1, 2017, doubled—and for lower-level offenses, more than doubled—the authorized fine amounts that may be assessed for many state felony and misdemeanor offenses. Future legislatures may be receptive to similar arguments regarding municipal fines.

Another recent trend is a growing legislative inclination to enact new court costs to offset expenses of court operations, including special costs for expensive capital projects.

Those who support such new costs contend that this may be the only way to fund necessary court operations when the political climate is hostile toward any sort of tax proposition.

Meanwhile, court actions challenging various aspects of statutory reform are working their way through the system. A legal challenge to the limitations on the percentage of revenue cities may derive from fines was argued before the Supreme Court of Missouri on November 11, 2016, and remains pending as of this writing (*City of Normandy et al. v. Nixon et al.*, No. SC95624). A declaratory judgment action is pending in St. Louis County Circuit Court, challenging the methodology for enforcement of the excess-revenue limitations (*Municipal League of Metropolitan St. Louis v. Galloway*, No. 16SL-CC02681).

The external environment is also in flux. Under the previous federal administration, the United States Department of Justice took an aggressive approach to issues related to the collection of fines and fees, and adopted a litigation position that sought to pressure cities to reform their police and municipal court practices and to give much greater weight to an offender's ability to pay. However, it cannot yet be ascertained what level of interest the current administration may have in these matters, nor what, if any, litigation positions the Department of Justice may take over the next few years. The attitude and level of interest toward these issues on the part of Missouri's newly elected governor and attorney general also remain unclear at this time.

Issues involving fines and fees continue to play out in a rapidly changing environment, with many competing interests "at the table." Under the leadership and direction of the state supreme court, Missouri's trial courts will continue to seek the appropriate balancing of these interests, improving their own performance and fulfilling their obligations in a manner faithful to the law and accountable to those whom the courts serve.



# The Third Generation of Bail Reform

**Timothy Schnacke** Executive Director, Center for Legal and Evidence-Based Practices

Previous generations of U.S. bail reform made changes to the pretrial release and detention process, but did not ultimately achieve fair and rational bail systems. Led by judges, the current, third generation of bail reform can succeed where earlier generations have failed.



In the movie *The Big Short*, financial guru Michael Burry (who famously shorted the subprime mortgage market in 2007, when he predicted that a housing bubble would burst),

is talking to Lawrence Fields (his boss at the hedge fund), and tells Fields that he sees the housing bubble and its eventual crash. Fields says, “No one can see a bubble. That’s what makes it a bubble.” And Burry replies, “That’s dumb, Lawrence. There’s always markers.” The same is true with bail reform. There are always markers showing the need for improvements at bail, and when those markers exist, reform becomes inevitable.

We are currently witnessing the inevitability of the “third generation of bail reform” in America.<sup>1</sup> And if you look at the two previous formal generations—indeed, if you look at all instances of bail reform over the centuries in both England and America—you will see that the same markers that led to changes in those eras are leading to changes we see today. Those markers, which include game-changing pretrial research, a meeting of minds over the need for reform, and, most importantly, interference with our underlying notions of both release and detention, tell us that bail reform is not merely some fleeting and quickly dissipating trend among just a few states.

<sup>1</sup> For help in fully understanding this generation of bail reform in practical terms, including its problems and solutions, the National Institute of Corrections has published two documents: T. R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, and *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial* (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2014), both of which may be found at <http://www.clebp.org/>.

No, bail reform is unavoidable and will happen in every state in America. If it does not come from jurisdictions desiring to change on their own, it will come from jurisdictions being forced to change by the courts, which are increasingly requiring state and local criminal justice systems to follow fundamental legal principles and to justify their release and detention processes.

## Earlier Generations of Bail Reform

The late Professor John Goldkamp first labeled formal eras of bail improvements “generations” of reform when he correctly noted that America had seen two such generations in the 20th century. However, America already attempted one generation of reform before the two formal eras we talk about today. That initial attempt at bail reform had its genesis in a single court case, decided in 1835, in which a federal judge set a secured financial condition (cash to be paid up front) that resulted in a bailable defendant being detained pretrial. Until then, virtually no bailable defendants had ever been detained pretrial for failure to pay a sum of money.

Indeed, until then, America had copied England’s long history of using so-called personal sureties (people who were not allowed to profit at bail, typically friends and family of defendants) pledging to pay money only if the defendant did not return to court after being released (what we now call unsecured bonds). Because America was slowly running out of these personal sureties, however, courts were attempting to force defendants to “self-pay” financial conditions in advance, which, in turn, caused increasing numbers of bailable defendants to stay in jail due to money. The detention of bailable defendants is a significant marker of bail reform because it interferes with certain underlying notions of release and detention. Accordingly, something big was bound to happen.

The reform at that time was uniquely American: a switch in 1900 to commercial sureties, who promised to “bail out” defendants for a small fee.

Unfortunately, along with commercial sureties came an increased reliance on “secured bonds,” which required defendants to pay something up front to obtain release from jail. The result was that the new system only exacerbated the problems leading to reform in the first place, and by the 1920s, prominent legal scholars, such as Roscoe Pound and Felix Frankfurter, were documenting the mistake. The fundamental point is that while it was done to facilitate the release of bailable defendants, the move from personal to commercial sureties in America is not called a formal “generation” of bail reform by historians, primarily because it made things worse.

The first formal generation of reform began in the 1920s and ended in the 1960s and was focused, once again, on finding ways to release bailable defendants, this time with the complicating layer of commercial sureties. It resulted in several things that we take for granted today, such as release on recognizance, nonfinancial conditions, risk assessment, and pretrial services supervision.

The second formal generation of reform began in the 1960s and ended sometime in the 1990s. This time, the focus was on “no bail” or detention and resulted in public safety being declared a proper consideration at bail; validation of preventive detention (keeping someone in jail intentionally in the first instance based on a prediction of future behavior); and a U.S. Supreme Court case, *United States v. Salerno* (1987), which provided important guidance on how to create fair and effective detention provisions but has often been ignored.

While these two generations of reform did not make things worse, they did not necessarily make things better, either. The best explanation appears to be that even though the states borrowed various palatable elements from each bail-reform era, the states never adequately dealt with the fundamental problem of bail, which today, as in 1835, continues to be secured money bonds.



**Colonial America**

America gradually adopts a broad right to bail for virtually all defendants. Bailable defendants are expected to be released.

**1835**

First clear recorded instance that a judge sets and leaves in place a secured financial condition leading to a bailable defendant being detained pretrial.

**1900**

After a gradual lessening of personal sureties throughout the 1800s, America formally switches to commercial sureties and an increased reliance on "secured bonds."

**1920s-1960s**

The first formal generation of reform was focused on finding ways to release bailable defendants and resulted in release on recognizance, nonfinancial conditions, risk assessment, and pretrial services supervision.

**1960s-1990s**

The second formal generation of reform was focused on "no bail" or detention and resulted in public safety being declared a proper consideration at bail; *United States v. Salerno* (1987) provides important guidance on how to create fair and effective detention provisions.

**2003**

Researchers begin creating multijurisdictional, actuarial pretrial risk-assessment instruments using research on risk that challenges many current assumptions about bail.

# Bail Reform Timeline

To sum up (and perhaps to oversimplify) centuries of bail reform in England and America, whenever society feels it has the wrong people in or out of jail pretrial, bail reform happens. Today, society largely feels that it has the wrong people both in and out of jail, and the cause is secured money bonds, or "money bail." Secured money bonds 1) keep low- and medium-risk defendants in jail when they could be safely managed in the community and 2) allow so-called high-risk defendants out of jail quickly, often without any assessment for risk and with no supervision. In sum, our rapidly growing knowledge of risk at bail is not only causing us to question various assumptions underlying our current "charge-and-money" bail systems, but also leading to full-out reform.



## The Current Generation of Bail Reform

Fortunately, the current generation of reform has certain fundamental advantages over the others, and it has a better-than-average chance at success. The first advantage is that numerous organizations are guiding states through reworking both bail (release) and no bail (detention) at the same time by using research and the law to craft bail provisions that allow for purposeful release and detention unobstructed by outside forces, such as money. Previous generations focused on the federal courts and left it up to the states to glean how the federal changes might manifest in their unique state systems.

The second advantage is that courts have all the substantive answers necessary to end this generation of reform and to avoid another in the future. Looking back, the first two formal generations of reform were simply working with incomplete knowledge of many fundamental aspects of bail. For example, persons in the first generation, while noble and well-meaning, knew about, but did not deal with, the fundamental problem of persons committing crimes while on pretrial release. There was simply no answer to that issue in America at that time. Similarly, persons in the second generation of bail reform created what they thought were fair and rational systems of detention, but they were based on faulty assumptions, such as that defendants charged with certain serious crimes were automatically at higher risk to commit the same or similar crimes while on pretrial release.



**2006**

Pockets of bail reform focusing on both release and detention due to deficiencies in previous generations of reform begin to grow in America.

**2011**

Attorney General's National Symposium on Pretrial Justice, illustrating a national consensus on certain fundamental pretrial improvements.

**2013**

The Conference of Chief Justices endorsed a policy paper written by the Conference of State Court Administrators promoting risk-based decision making and reducing the overall use of financial releases; Laura and John Arnold Foundation releases groundbreaking research on risk, risk assessment, and pretrial outcomes.

**2014**

Committee created by Chief Justice Rabner (NJ) makes recommendations leading to changes to the constitution, statute, and state bail practices; the Ninth Circuit Court of Appeals strikes down a state detention provision under federal law; the New Mexico Supreme Court uses the history of bail, fundamental legal principles, research, and national standards to declare common bail practices arbitrary and unlawful.

**2015**

Civil rights organizations file the first federal lawsuit challenging state money bail practices under the Federal Equal Protection Clause.

**2017**

New Jersey's new system of release and detention goes live; although money bail is left intact, judges cease using it for virtually all defendants.

Today, a combination of groundbreaking risk research and a deeper understanding of the history of bail and fundamental legal principles make it possible for states to create pretrial release and detention schemes that are legally justified and achieve the underlying purposes of bail.

The third advantage is perhaps the most important of all, which is that in this generation of bail reform, judges are getting involved. In the first generation, noted bail researcher and law professor Caleb Foote lamented that judges had been largely absent from all relevant discussions. In the second generation, the movement was driven mostly by the executive and legislative branches of the federal government. Bail is inherently a judicial function, and yet very few judges were seen during those periods to be helping to move the field forward by articulating whom to release, whom to detain, and how to do it. In this generation, though, judges are becoming actively involved, and this is seen by judicial movement on several fronts.

On the first front are judges articulating broad policies to guide state and local jurisdictions. In 2013 the Conference of Chief Justices endorsed a policy paper written by the Conference of State Court Administrators that recommended revisions to laws, policies, and practices to promote risk-based decision making and to reduce the overall use of financial releases.

In 2014 a committee created by Chief Justice Rabner of New Jersey studied release and detention and issued a report making recommendations that led to a complete overhaul of the state criminal pretrial system, which included changing New Jersey's constitutional bail provision and bail statute, as well as creating a statewide pretrial services agency. (See Hon. S. Rabner, "Bail Reform in New Jersey," *Trends in State Courts* 2017, pp. 27-29.) Just last year, California's chief justice, Tani Cantil-Sakauye, called for reform to that state's bail system and created a task force to begin studying the issues. But it is not only chief justices leading these endeavors. In Colorado and Delaware, initial bail reform efforts were largely spearheaded by bail-setting trial judges. In Missouri, while now enjoying the strong support of the chief justice and other appellate judges, early significant and groundbreaking progress was (and continues to be) the work of a part-time, municipal court judge. (See Hon. K. A. W. DeMarce, "How the Fines and Fees Issue Impacted the Missouri Courts," *Trends in State Courts* 2017, pp. 2-7, for an overview of reforms in Missouri.)

On the second front are federal judges, who have been asked to rule on various state and local bail provisions under the U.S. Constitution, mostly under the Equal Protection Clause.

# Trends in the U.S.

## Maryland's Pretrial Reform

The Maryland Court of Appeals unanimously approved changes to court rules governing money bail (effective July 1, 2017). Rule 4-216.1 requires judges to consider whether a defendant can afford to make bail before setting pretrial release conditions. The rule also requires judges to impose the “least onerous” conditions when setting bail for a defendant.

See Rules Order, at <https://tinyurl.com/k2tkwog>.



The organizations bringing these lawsuits initially focused on smaller jurisdictions by attacking money bail used in municipal courts. Most of these cases have settled, often with judges issuing orders containing language essentially forbidding money-based detention. Many persons have downplayed these cases due to the small size of the jurisdictions and the fact that they have settled, but these suits are emerging in larger and larger jurisdictions and with similar results. Indeed, in a suit filed recently in San Francisco, both the sheriff and the city attorney have publicly refused to defend the existing money bail system and even called it unconstitutional. Like all difficult issues, the federal district courts will likely split on the merits, leaving it to the federal appeals courts to settle the matter. Indeed, one such case is already before the Eleventh Circuit, and others will likely follow.

Moreover, on this federal front are additional organizations creating national litigation strategies that have sued, and intend to sue, on more traditional legal theories for bail cases. For example, in a 2014 case before the Ninth Circuit Court of Appeals, the ACLU successfully argued that an Arizona detention provision was unconstitutional pursuant to a straightforward, substantive

due-process analysis based on the U.S. Supreme Court's opinion in *United States v. Salerno*. The Ninth Circuit's opinion in that case raises doubts about the constitutionality of numerous existing state detention provisions, most of which would fail not only when held up to *Salerno*'s substantive due-process analysis, but also under procedural-due-process or excessive-bail analyses.

Finally, on the third front are state and local judges who are simply doing their jobs as judges, balancing the interests in particular cases and ruling accordingly. The most striking and far-reaching example comes from the New Mexico case of *State v. Brown* (2014), where public defenders appealed a defendant's pretrial detention due to a \$250,000 secured money condition all the way to the New Mexico Supreme Court. In a 48-page opinion, the chief justice, without dissent, relied on the history of bail, fundamental legal principles, pretrial research, and national standards on pretrial release and detention to declare that the financial condition set in that case was arbitrary and unlawful.

In *Brown*, the New Mexico Supreme Court essentially ruled that the bail-setting judge was simply not following state law as written. The lesson for America is that an identical ruling could happen



# Trends in the U.S.

## Kentucky's Pretrial Reform

The Kentucky Pretrial Risk Assessment Instrument underwent a validation assessment in 2010, and in 2013 Kentucky pretrial services began using a risk-assessment tool developed and tested by the Laura and John Arnold Foundation. This Public Safety Assessment (PSA) tool is helping Kentucky reduce reliance on monetary bonds.

See "Investigating the Impact on Pretrial Detention on Sentencing Outcomes," at <http://tinyurl.com/hbkvgjp>.



in virtually any state; throughout this country, bail-setting judges are not necessarily following the laws as written, and so other states are ripe for a *Brown*-type opinion. Interestingly, like the years of study by the New Jersey Supreme Court committee, mentioned above, this single case in New Mexico illuminated the same bad laws, policies, and practices that led to a New Jersey's legal overhaul. Accordingly, New Mexico, too, is changing its own constitutional bail provision and court rules concerning release and detention.

The active involvement of judges on so many fronts means that this generation of bail reform, unlike any previous generation, may see a final solution to a problem that has vexed America since 1835. Only judges, in their roles as balancers, can best use history, law, national standards, and pretrial research to help states craft improvements to laws that are in dire need of change. Like many other areas of social and legal change, this judicial assistance can come in two ways: 1) helping stakeholders, up front, to understand the legal boundaries involved in crafting changes to bail laws or 2) ruling on those changes after the fact, and forcing the states to carefully and completely justify any limitations to pretrial freedom.

## Conclusion

In the 1985 book *Views from the Bench*, Justice William Brennan catalogued the Supreme Court's opinions enforcing federal constitutional protections against the states, as well as state supreme court opinions providing even more constitutional protections than provided in the federal law. Overall, he said, these varied opinions illustrated and gave "full effect" to the so-called Boyd Principle, which, as articulated by Justice Bradley in the 1886 case of *United States v. Boyd*, was as follows: "Constitutional provisions for the security of person and property should be liberally construed. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."

The third generation of bail reform has fully illuminated money bail's stealthy encroachment on the constitutional rights of American defendants since the early 1800s. It is an encroachment that now affects some 12 million persons arrested each year. The trend in state courts today is, or at least should be, to bring it to an end.





# The Role of Courts in Eliminating the Racial Impact of Criminal Justice Debt

**Larry Schwartztol** Executive Director, Criminal Justice Policy Program, Harvard Law School

Over the past two years, the harms associated with criminal justice debt have gained widespread attention, which has sparked promising momentum for reforms. Central to understanding those harms is identifying the racially disparate effects of practices in jurisdictions around the country—courts should champion reforms to eliminate those disparities.

Courts across the country have been galvanized to confront a deeply rooted challenge to the administration of justice: fees and fines attached to criminal convictions, which are imposed or enforced in ways that contradict the values of the legal system. In recent years, a growing wave of actors throughout the justice system, and across civil society, have come to appreciate the severe harms associated with criminal justice debt. These harms can take many forms. Jailing people due to their inability to pay a financial obligation transgresses the longstanding principle that debtors' prisons have no place in America.

Relying on criminal justice debt to fund court operations can generate perverse incentives and distort the administration of justice. Enforcing debt through onerous tools, like driver's license revocation, can trap individuals in a vicious cycle of poverty. And saddling formerly incarcerated individuals with mountains of debt impedes their ability to reintegrate successfully into their communities. These concerns impact broad swaths of the country and undermine the essential mission of courts. But the negative impacts of these practices are not evenly distributed.

Time and again, across the country, these policies and practices have impacted black and Latino individuals and communities most harshly. Indeed, it is no surprise that for many Americans the most salient example of the impact of fees and fines is the discriminatory system exposed in the Justice Department's investigation of Ferguson, Missouri. That investigation revealed the stark racial disparities that characterize criminal justice debt; it also shined a light on the systems of racial injustice that created those outcomes, depicting a legal system that relied on stereotyping and bias to target black residents as sources of revenue. Ferguson triggered a national reform movement aimed at criminal justice debt. The growing movement for reform must devote special attention to reforming policies that exacerbate or reinforce racial disparities in the criminal justice system.

Judges and court administrators can play a leading role in finding solutions to the deeply entrenched racial disparities related to criminal justice debt. Chief judges and justices throughout the country have taken action to change practices in their home jurisdictions and can be uniquely powerful messengers in urging legislators and other policymakers to pursue reform. Judges and court administrators have also engaged with the National Task Force on Fines, Fees and Bail Practices to seek models for reform and promote best practices. As this work continues to take shape, it is critical that judges and court administrators craft reforms that are informed by racial justice imperatives and take direct steps to stamp out discriminatory practices.

## Trends in the U.S.

### Atlanta Municipal Court's Warrant Amnesty Program

For six weeks in the spring of 2016, the Municipal Court of Atlanta offered amnesty to individuals with outstanding warrants issued before January 1, 2015 for failing to appear in court. Warrants were canceled and the contempt fees waived, allowing individuals to resolve their outstanding cases.

See "2016 Warrant Amnesty Program," at <https://tinyurl.com/m6rbxxd>.



### Milwaukee Municipal Court's Warrant Withdrawal Wednesdays

For three Wednesdays in November 2016, the City of Milwaukee Municipal Court served 2,400 defendants, representing a total of 15,397 cases. More than 1,500 defendants had warrants withdrawn; 1,048 had driver's license suspensions vacated; and more than 500 defendants had payment installment plans approved. Municipal court judges posted a video on Facebook to promote the program.

See "Warrant Withdrawal Wednesdays," video, at <https://tinyurl.com/lyqrpxb>.





## The Prevalence of Racial Disparities

To cure the harms associated with criminal justice debt, courts must diagnose the problem—including harmful racial disparities. Ferguson is a good starting place, not because it was the first jurisdiction whose practices resulted in stark racial disparities (it was not) but because the Justice Department’s investigation unearthed such a telling tale of abuse. That report revealed officials throughout the system who undertook practices motivated by a desire to raise municipal revenue. In 2013 the municipal court in Ferguson—a city of 21,135 people—issued 32,975 arrest warrants for nonviolent offenses, mostly driving violations. Those practices, though pervasive, did not impact all residents equally.



Justice Department investigators determined that “Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping” (DOJ, 2015: 4). Indeed, after conducting statistical analysis of numerous indicators of police-civilian interactions, the report concluded that “African Americans experience disparate impact in nearly every aspect of Ferguson’s law enforcement system.” They were overrepresented by significant margins in rates of traffic stops, arrests, and citations and much more likely than whites to receive citations for discretion-heavy violations, like “Manner of Walking” charges, that fueled the municipality’s reliance on court-related revenue (DOJ, 2015: 62). The impacts of this system were not merely statistical. As the Justice Department reported, police and court officials often treated black Ferguson residents in a degrading or hostile manner. In combination, these practices spawned “great distrust of Ferguson law enforcement, especially among African Americans,” a dynamic that “made policing in Ferguson less effective, more difficult, and more likely to discriminate” (DOJ, 2015: 79).

The dynamics in Ferguson provide a glaring example of how enforcement of court debt can metastasize, but those dynamics are not unique to Ferguson. A recent report on traffic courts in California, for example, found that African-Americans disproportionately experience onerous financial obligations, often enforced through driver’s license suspension—a sanction that does nothing for public safety when used to enforce debt but that can knock people living on the economic margins into poverty. One recent study examined national data to determine what factors correspond to the heaviest reliance on municipal fines and concluded that “[t]he cities most likely to exploit residents for fine revenue are those with the most African Americans” (Kopf, 2016).

The impact of criminal justice debt often extends beyond individuals in the criminal justice system to their families or communities. This means that racially disparate application of fees and fines will have a concentrated effect on communities of color. A 2015 report explored the effects of criminal justice debt on the families and friends of individuals upon whom courts have imposed that debt. It found that “it is not just the individual who is being punished [but] also the incarcerated individual’s friends and family who become, in effect, a parallel welfare state” (Nagrecha, Katzenstein, and Davis, 2015). The racial impact of fees and fines, in other words, snowballs within a community. When the most onerous practices are concentrated disproportionately among racial minorities, their communities suffer the consequences of lost wealth and increased exposure to the criminal justice system.

## The Linkage Between Criminal Justice Debt and Race

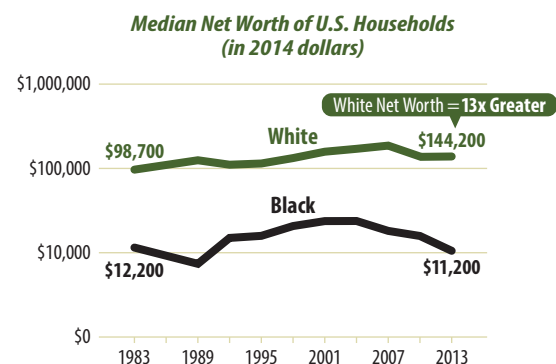
The racially disparate consequences of criminal justice debt reflect many causes. Often, inherently harmful policies—like revenue structures that encourage aggressive reliance on criminal justice debt—are amplified by racial bias laced throughout the criminal justice system.

Ferguson, again, is instructive. The discriminatory practices detailed in the Justice Department's investigation took root because of a long history of residential segregation and discrimination in access to education, homeownership, and other opportunities. In 2014, one scholar analyzed the decades of discriminatory policies and practices that created the racial and wealth disparities that enabled Ferguson's legal authorities to target black residents for predatory practices. "A century of evidence demonstrates that St. Louis was segregated by interlocking and racially explicit public policies of zoning, public housing, and suburban finance, and by publicly endorsed segregation policies of the real estate, banking, and insurance industries" (Rothstein, 2014: 30). Entrenched inequality can structure the relationship between communities, police, and the broader legal system. Intensive residential segregation, often accompanied by patterns of concentrated poverty, may create disparate policing practices, and in places like Ferguson, that means predominantly black communities subject to policing practices designed to aggressively enforce low-level (and fee-generating) offenses. When these dynamics lead law enforcement to target communities in ways that do not serve public safety, public trust erodes. This can spark a vicious cycle of exposure to the criminal justice system and increasing risk of poverty.

Race matters in shaping who is exposed to criminal justice debt, and those effects are amplified by the significant racial wealth gap, which makes it more likely that excessive fees and fines will knock African-Americans into a tailspin of debt and further encounters with the criminal justice system. In 2014 the Pew Research Center found that the average wealth of white households was 13 times greater than the average wealth of black households. This wealth gap can have significant consequences for how criminal justice debt impacts individuals. Those with means will be able to disentangle themselves from ongoing financial obligations in criminal cases.

For those in poverty, court debt can quickly spiral: It can result in long-term payment plans, often with high interest rates, that mean impoverished people pay more in absolute terms; poor people may incur penalty fees or other court costs that flow from missed payments; and, in some instances, those who are unable to pay face incarceration, which in turn can further destabilize individuals by jeopardizing employment, housing, or health care.

Though neutral on their face, these wealth-related disparities will exacerbate the racial impact of criminal justice debt. Numerous studies have shown the hugely disproportionate impact of the criminal justice system on African-Americans. A landmark study by sociologists Bruce Western and Becky Pettit found that black men are eight times more likely to be incarcerated than whites, a disparity that outstrips the significant racial gaps along metrics like employment and infant mortality. This disproportionate exposure to the prison system carries significant economic consequences (in addition to the profound noneconomic consequences), including increased debt burdens. As one leading expert on criminal justice debt has written, "solely because racialized communities are the disproportionate focus on the criminal justice system, [monetary sanctions] are imposed in a disparate way on people of color and thus are implicated in perpetuating racial and ethnic inequality" (Harris, 2016: 156).



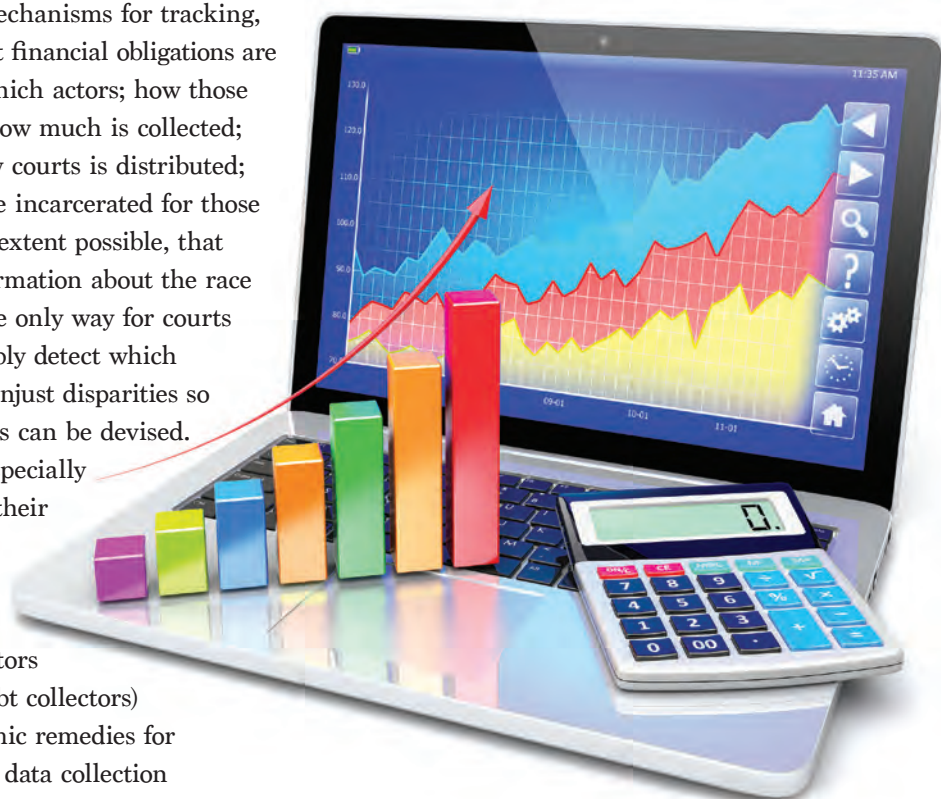
## Solutions for Courts

Countering the racial disparities connected to criminal justice debt should be an imperative for all courts. Judicial systems can reinforce harmful practices, but they can also be drivers of meaningful reform. Of course, many reforms aimed broadly at the pathologies of criminal justice debt will ease the racial impact as well. For example, significantly reducing the number of financial penalties or “user-pay” fees that shift the expense of the court system to criminal defendants would generally reduce the exposure of communities of color to criminal justice debt. Similarly, ensuring meaningful ability-to-pay hearings before debt is imposed or enforced would disrupt the cycle of debt and incarceration that often ensnares poor people moving through the legal system. Some reforms, however, should be specifically prioritized for ameliorating racial disparities.

Ensuring robust collection of data is an important place to start. Data on the operation of criminal justice debt is, in general, harder to obtain than it should be. Courts and other justice stakeholders should develop robust mechanisms for tracking, among other things, what financial obligations are being imposed and by which actors; how those debts are enforced and how much is collected; how revenue collected by courts is distributed; and how often people are incarcerated for those debts. To the maximum extent possible, that data should include information about the race of defendants. This is the only way for courts and other actors to reliably detect which practices may result in unjust disparities so that appropriate remedies can be devised. Courts should play an especially active role in reviewing their own practices and in monitoring potential disparities driven by other criminal justice actors (like police or private debt collectors) and in identifying systemic remedies for those disparities. Taking data collection seriously is a crucial first step.

Racial disparities cannot be effectively eliminated if they are not measured. Actively seeking to identify and cure race disparities will also improve the courts’ legitimacy in the eyes of communities who believe that the legal system fails to afford them equal status.

Training is also critical. Courts should ensure that actors throughout the judicial system undergo training designed to eliminate racial bias. This should include training on implicit bias and on the dynamics of race and poverty that can create discriminatory impacts. Courts should also focus training on areas where facially neutral practices may have a disparate effect. For example, it is crucial in all instances that courts conduct meaningful ability-to-pay determinations. Adhering to best practices in that area would safeguard against injustice for all individuals coming before the courts. It would also help counteract disparities at a crucial point in the system. Courts, meanwhile, should not just train internally but encourage all the actors who interact with the judicial system, including prosecutors, defense attorneys, and court clerks, to undergo similar training.



Courts should also play an active role in minimizing the application of practices that function as poverty penalties or poverty traps. (For a discussion of how policies can function as poverty penalties and poverty traps, see Criminal Justice Policy Program, 2016.) Chief judges should systematically examine legal authorities to determine where judges maintain discretion to avoid dispositions that exacerbate poverty and then issue rules or guidance to ensure that trial judges use that discretion expansively. Among other things, chief judicial officers should issue policies or provide guidance advising trial judges to waive untenable financial obligations and avoid sanctions, like suspension of driver's licenses, that can ensnare individuals in poverty. Where existing law mandates outcomes that penalize or entrench poverty, chief judges should educate lawmakers on the counterproductive effects of a legal system whose impacts depend on a person's wealth, especially given the well-established links between poverty and race.

Finally, courts should engage other stakeholders consistently to ensure that the highest values of the legal system are upheld. This means sending a clear message to legislators that judicial processes should not be funded on the backs of (predominately poor) people who move through the legal system. And it means insisting that decision makers throughout the system confront the well-established racial disparities that too often characterize criminal justice debt.

## References

- Criminal Justice Policy Program (2016). "Confronting Criminal Justice Debt: A Guide for Policy Reform." Report, Harvard Law School, Cambridge, Massachusetts, September 6.
- A. Harris (2016). *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor*. New York: Russell Sage Foundation.
- G. Kopf (2016). "The Fining of Black America," *Pricenomics*, June 24.
- M. Nagrecha, M. F. Katzenstein, and E. Davis (2015). "First Person Accounts of Criminal Justice Debt: When All Else Fails, Fining the Family." Report, Center for Community Alternatives, New York City.
- R. Rothstein (2014). "The Making of Ferguson: Public Policies at the Root of Its Troubles." Report, Economic Policy Institute, Washington, D.C., October 15.
- U.S. Department of Justice (DOJ), Civil Rights Division (2015). *Investigation of the Ferguson Police Department*. Washington, DC: U.S. Department of Justice.

# Trends in the U.S.

## Minnesota's Driver Diversion Pilot Program

The Driver Diversion Pilot Program (DDP) was developed to support participants in paying any outstanding citations and in fulfilling state-designated requirements necessary to reinstate their driver's licenses. The program permits participants to legally drive while paying off their fines and fees.

See "Driver Diversion Pilot Program," at <https://tinyurl.com/n5t5nqx>.



## Conclusion

The increased national attention on the harms associated with criminal justice debt is a promising development. Many judicial leaders have already taken a leading role in supporting reform. As courts and others work to bring about change, it is imperative that the racially discriminatory impact of fees and fines guide the reform agenda. Those disparities are not incidental, and changes that do not address them directly may fail to cure them. The sound administration of justice—and the legitimacy of the courts in all communities they serve—depends on a zealous effort to eliminate racial disparities in this consequential area.





# Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees



**Andrea M. Marsh** Director, Richard and Ginni Mithoff Pro Bono Program, The University of Texas School of Law

States are considering new approaches to mitigate the individual and public costs of license suspensions tied to a driver's failure to pay fines, fees, and surcharges from traffic or criminal cases. Approaches include relicensing programs, enhanced procedural protections, and elimination of suspensions for nonpayment.

Millions of individuals across the United States are unable to drive legally because they have failed to pay fines, fees, and surcharges assessed in traffic or criminal cases.<sup>1</sup> The negative economic and fiscal effects of driver's license suspensions often are highly disproportionate to the dollar amounts of fines and fees owed.

Legislators, judges, and court administrators across the country are increasingly aware of

the costs driver's license suspensions impose on court systems, families, and taxpayers. Several jurisdictions are investing in programs that help people regain their driving privileges and reconsidering the circumstances in which driver's license suspension is authorized. Recent litigation challenging driver's license suspension practices in three states also has highlighted problems with some current suspension practices and spurred procedural reforms.

<sup>1</sup> States vary in whether they classify traffic violations as civil infractions or as criminal-misdemeanor offenses. Both states that classify traffic violations as civil infractions and states that classify traffic violations as criminal offenses require or allow for the suspension of driver's licenses for nonpayment of fines and fees related to traffic violations. This article refers to "traffic cases" without regard to how those cases are classified in state law.



## Overview of State Driver's License Suspension Policies

Judges and motor-vehicle agencies suspend driver's licenses for a variety of reasons. States initially authorized driver's license suspensions to protect public safety on their roads by removing dangerous drivers from the road, changing driver behavior, and punishing unsafe drivers. Traffic-safety suspensions typically are imposed when an individual commits a specific traffic-related offense, such as driving while intoxicated, or accumulates points assessed for multiple moving violations.

Over time, states have expanded the use of driver's license suspensions beyond traffic safety. Many now use suspensions to punish and deter various criminal or otherwise socially undesirable behaviors unrelated to driving. For example, all states suspend driver's licenses when parents fail to pay child support. Twelve states suspend driver's licenses when individuals are convicted of drug offenses. Judges in Wisconsin suspend driver's licenses individuals are convicted of curfew or disorderly conduct violations, and Florida suspends licenses for truancy. A 2015 Vermont legislative report identified 74 nontraffic offenses that triggered driver's license suspensions under state law.

A third category of driver's license suspensions consists of suspensions for nonpayment of fines, fees, and other costs related to traffic or criminal convictions. These suspensions are not a direct penalty for the underlying behavior, but instead operate in addition to those direct penalties and aim to encourage and coerce compliance with financial penalties imposed for that behavior.

Driver's license suspensions for nonpayment of traffic or criminal financial penalties fall into three subcategories. First, most states require or authorize the suspension of driver's licenses for nonpayment of fines and fees assessed in traffic cases. Second, some states suspend driver's licenses for nonpayment of fines and fees in nontraffic criminal cases. Finally, a small number of states, including

New Jersey and Texas, assess surcharges in addition to fines and fees for traffic offenses. In states with surcharge programs, failure to pay surcharges results in driver's license suspension.

## Suspensions for Nonpayment of Fines, Fees, and Surcharges

Fines, fees, and surcharges even imposed for a relatively minor traffic offense often total hundreds of dollars, and drivers who owe financial assessments in multiple cases quickly accumulate thousands of dollars in court debt. While some individuals may willfully refuse to pay their debts when they can afford to do so, there are many people who face driver's license suspension for failure to pay fines, fees, and surcharges they cannot afford.

Because the total amount owed by a single individual can be so large, it is not only the poorest individuals who cannot afford to pay. Millions of people across the country have driver's licenses that are suspended for failure to pay fines, fees, and surcharges imposed in traffic or criminal cases.

In Texas alone, 1.8 million people have licenses suspended for failure to pay judicial costs, including almost 1.4 million people that have failed to pay traffic surcharges. Over 4 million Californians, representing 17 percent of the state's adult population, have licenses suspended for failure to appear/pay in traffic cases. In Virginia, almost 1 million drivers have licenses suspended for nonpayment. Approximately 60 percent of driver's license suspensions in both Wisconsin and Vermont are for nonpayment of court debt.



Suspensions for fines, fees, and surcharges in traffic or criminal cases differ from other types of driver's license suspensions in some important ways. For example, driver's license suspensions imposed as a direct penalty for traffic or criminal offenses generally last only for a specific, limited time. In contrast, most suspensions for nonpayment are indefinite and end only when the suspended driver complies with payment orders.

Most states that suspend driver's licenses for nonpayment also do not extend occupational or other restricted licenses to drivers who lose their licenses for this reason, even when restricted licenses are available for other types of suspensions. In other states that do not prohibit the issuance of restricted licenses in cases of suspension for nonpayment, narrow eligibility criteria nevertheless exclude many low-income drivers. For example, in Virginia, suspended drivers who need a license to search for and obtain employment cannot receive a restricted license because they are unemployed.

## Costs of Driver's License Suspensions

### *Consequences for Individuals and Families*

In many parts of the United States, it is difficult for individuals to maintain employment if they cannot drive. Eighty-six percent of Americans drive to work. Even when people can reach work sites without a car, many jobs require a valid driver's license. Employers screen candidates for driver's licenses when jobs involve driving on-site or require frequent travel between different locations, but even when those conditions do not apply, some employers view having a valid driver's license as an indicator of reliability.

A study of New Jersey drivers documented the stark employment consequences of license suspension. Almost 45 percent of suspended drivers lost their jobs when their license was suspended, and 45 percent of drivers who lost their jobs could not find another job while their licenses were suspended. Even when suspended drivers found another job, over 85 percent reported a decrease in income.

Suspended drivers who can take public transportation to work still may need a car to take their children to school or family members to doctors' appointments. Housing applications often require a copy of the applicant's driver's license. These consequences undermine the economic stability of drivers with nonpayment suspensions and damage entire families.

The financial and familial consequences of license suspension are so severe that 75 percent of drivers continue to drive after a suspension, which in turn exposes them to criminal prosecution and additional financial penalties.

All 50 states treat driving with a suspended license as an offense more serious than a standard traffic violation, and in most states it is a misdemeanor offense punishable by imprisonment. Although the severity with which states punish driving with a suspended license originated in a period when most suspensions were directly triggered by traffic violations, state criminal laws generally do not treat drivers differently based on the reason for their suspensions. Low-income drivers whose licenses are suspended because they cannot afford to pay fines and fees are at risk of being arrested, detained before conviction, and punished just as severely as drunk drivers whose licenses have been suspended to protect public safety.



### Public Costs

The employment consequences faced by millions of drivers suspended for nonpayment impact the entire economy. Nonpayment suspensions, and the driving-with-a-suspended-license offenses that follow those suspensions, also impose costs on law enforcement, courts, and corrections agencies that impact government budgets and public safety.

When law enforcement officers book an individual with a nonpayment suspension for driving without a license, it diverts officers from other public safety priorities. In Washington, state police estimated that each driving-with-a-suspended-license arrest occupies nine hours of officer time that could be dedicated to offenses that present public safety risks.

As driving-with-a-suspended-license cases proceed through the courts, they consume limited judicial, prosecutorial, and defense resources. For example, suspensions for nonpayment of traffic surcharges produced over 400,000 new driving-with-a-suspended-license criminal filings in Texas state courts over a three-year period.

Arrests for driving with a suspended license also put pressure on local corrections budgets and contribute to jail overcrowding. A study of jail admissions in five Texas counties documented that 6 percent to almost 20 percent of admissions were for driver's license offenses.

### Legal Constraints on Suspensions for Nonpayment

Another potential cost of nonpayment suspensions is exposure to litigation. Lawsuits filed in California, Tennessee, and Virginia in 2016 and 2017 challenge nonpayment suspension practices in those jurisdictions on behalf of individuals whose licenses are indefinitely suspended for nonpayment of fines and fees they cannot afford.

All three challenges share some common claims. They argue that license suspensions for nonpayment are unconstitutional when a driver does not willfully refuse to pay but, rather, is unable to pay.

## Trends in the U.S.

### Phoenix Municipal Court's Compliance Assistance Program

The Compliance Assistance Program (CAP) is designed to help resolve past-due traffic fines that may be preventing reinstatement of a driver's license. The program allows a person to enter a payment plan for all civil-traffic, civil, and parking charges without having to see a judge.

See Phoenix Municipal Court, "Compliance Assistance Program," at <https://www.phoenix.gov/court>.





# Trends in the U.S.

## Spokane County Relicensing Program

The Office of the City Prosecuting Attorney in Spokane, Washington, has a relicensing program that provides eligible participants with the opportunity to waive collection fees, combine all traffic-fine payments from participating jurisdictions into a manageable monthly amount, and have all participating jurisdictions release holds on license reinstatement.

See Spokane County District Court, “Relicensing Program,” at <https://www.spokanecounty.org/3120/Relicensing-Program>.



Additionally, they assert that state suspension practices violate the due-process clause of the U.S. Constitution because they do not provide the driver notice of and an opportunity to be heard on the key issue of ability to pay.

The Department of Justice filed a Statement of Interest on behalf of the United States in the Virginia case, *Stinnie v. Holcomb*. In that filing, the DOJ cited case law, including *Bell v. Burson*, 402 U.S. 535 (1971), holding that drivers have a protected interest in maintaining their driving privileges, and that interest cannot be taken away without due process. The DOJ agreed with the plaintiffs that courts must provide notice and an opportunity to be heard before suspending a license for nonpayment; must inquire into whether the failure to pay was willful or the result of inability to pay; and may not suspend driver’s licenses when a driver is unable to pay.

*Stinnie* was dismissed on jurisdictional grounds in March 2017. However, in dismissing the case, the district court recognized the circularity of suspensions for nonpayment: “[B]ecause [Mr. Stinnie] cannot pay the fees, his license is suspended, but because his license is suspended he cannot pay the fees” (Memorandum Opinion, *Stinnie v. Holcomb*). Cases challenging suspensions for nonpayment remain pending in California and Tennessee.

## Rethinking Suspensions for Nonpayment

States and local entities across the country are taking steps to reduce the costs driver’s license suspensions impose on their communities and their courts. Other ideas to reduce the costs of suspensions are under review.

### Relicensing Programs

Local jurisdictions from Seattle to Miami have created or partnered with relicensing programs to reduce the number of unlicensed drivers. Relicensing programs often operate as a component of diversion programs for driving-with-a-suspended-license cases, but also may exist as temporary amnesty programs. Relicensing programs are particularly useful in cases involving nonpayment, when suspensions are indefinite and relicensing will not automatically occur after a specified amount of time.

Relicensing programs help drivers navigate requirements for reinstatement. These programs can be effective, but not all suspended drivers are eligible, particularly those drivers who are unable to make any payments toward their court debts. Relicensing programs are complicated because drivers often owe debt across multiple jurisdictions, only some of which may be participating in a relicensing program. Relicensing programs also require funding for staff and operations. Jurisdictions justify these expenses as allowing them to avoid future expenditures for repeat offenses of driving with a suspended license.

### Enhanced Procedural Protections

Virginia and California, two states targeted in recent litigation, have adopted new procedural rules to protect low-income drivers facing suspension for nonpayment. In November 2016, the Virginia Supreme Court adopted a court rule requiring judges to consider ability to pay when assessing fines and fees. California has made it easier for drivers to access courts to assert inability to pay.

These enhanced procedural protections are improvements but do not address all the issues raised in the legal cases and will not eliminate



license suspensions for drivers who are unable to pay. For example, California's new court access rules do not address notice claims and do not require judges to grant realistic payment plans or other alternatives to drivers who cannot afford to pay fines and fees in full.

A barrier to effective procedural reform is the limited menu of options available when drivers cannot afford to pay fines, fees, and surcharges up front. Most common alternatives to immediate payment in full still involve payment—sometimes in a reduced amount but more often the full amount over a limited time period. These alternatives remain inaccessible to very low-income drivers or drivers with large amounts of court debt.

### *Eliminating Suspensions for Nonpayment*

Certain analysts have recommended eliminating driver's license suspensions for nonpayment of fines, fees, and surcharges in traffic and criminal cases. Some states are considering this approach. Missouri reinstated all driver's licenses suspended strictly for failure to pay, and legislation filed in California would prohibit future suspensions for nonpayment.

Eliminating nonpayment suspensions would de-link suspensions from drivers' income levels. It also would improve the economic prospects of drivers who owe debts to the courts, and thus their ability to pay those debts.

However, some states resist this approach because they believe that the threat of suspension is an effective tool for increasing compliance with court orders and collections.

While there is some evidence that the threat of suspension may result in increased compliance in child-support cases, there are important differences between nonpayment of child support and nonpayment of court debt. Unlike court debt, the amount of child support is tailored to parental income at the front end, so there are greater procedural protections and greater reason to believe that parents can pay what they owe.



Studies also have shown that court debt remains pending for longer periods of time after license suspension than does child-support debt, suggesting that suspension is less effective at increasing collection of court debts.

Other states have eliminated suspensions for nonpayment of debt arising from nontraffic criminal cases, while retaining suspension for nonpayment of traffic fines and fees. The states in this category include Washington and Vermont. The rationale for this middle-ground approach is that driver's license suspensions should be limited to reasons that are directly related to driving and road safety, but that suspensions that coerce compliance with financial penalties in traffic cases preserve the deterrent value of those penalties and serve a legitimate driving-safety purpose.

It should be noted that the DOJ rejects this reasoning for retaining driver's license suspensions for nonpayment in traffic cases, as do some state legislative reports. In a March 2016 "Dear Colleague" letter, the DOJ stated that license suspensions for nonpayment of any type of debt are a debt-collection tool, and distinguished them from suspensions imposed for traffic violations to protect public safety.

## Conclusion

States may suspend licenses as a direct penalty for traffic offenses and, thus, promote traffic safety. These traffic-safety suspensions exist independently from suspensions for failure to pay traffic fines, fees, and surcharges, and can be imposed without exposing millions of drivers to the threat of suspension for nonpayment of financial penalties they are unable to pay.

If states are unwilling to eliminate all suspensions for nonpayment, they can adopt policies that go farther than relicensing programs and enhanced procedural protections to mitigate the consequences of nonpayment suspensions. These policies should include limiting nonpayment suspensions to a specified period of months and making restricted licenses available in cases of suspension for nonpayment. Jurisdictions also may want to consider ordering limited suspensions that automatically allow for restricted-driving privileges without the need for legal intervention in individual cases, as well as reclassifying violations for driving with a suspended license to a lesser, non-jail-eligible offense when nonpayment is the underlying cause of the suspension.

## References

- A. Bender, S. Bingham, M. Castaldi, E. Della Piana, M. Desautels, M. Herald, E. Richardson, J. Stout, and T. Zhen (2015). "Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California." Report, Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al. Online at <https://tinyurl.com/l92wnmz>.
- J. A. Carnegie (2007). "Driver's License Suspensions, Impacts and Fairness Study." Final report, Alan M. Voorhees Transportation Center, Rutgers, State University of New Jersey, August. Online at <https://tinyurl.com/lznp4gk>.
- V. Gupta and L. Foster (2016). "Dear Colleague Letter." U.S. Department of Justice, Washington, D.C., March 14. Online at <https://tinyurl.com/z2pyslc>.
- Suspended/Revoked Working Group (2013). *Best Practices Guide to Reducing Suspended Drivers*. Arlington, VA: American Association of Motor Vehicle Administrators. Online at <https://tinyurl.com/kzamc49>.

## Legal Cases

- Damian Stinnie v. Richard Holcomb*, W.D. Va., 3:16-cv-00044-NKM (July 6, 2016); Class-Action Complaint. Online at <https://tinyurl.com/l5jqjdy>.
- Damian Stinnie v. Richard Holcomb*, W.D. Va., 3:16-cv-00044-NKM (November 7, 2016); Statement of Interest of the United States. Online at <https://tinyurl.com/m6qhzmng>.
- James Thomas v. Bill Haslam*, M.D. Tenn., 3:17-cv-00005 (January 4, 2017); Class-Action Complaint.
- Rubicon Programs v. Superior Court of California County of Solano*, Sup. Ct. Ca., FCS047212 (June 15, 2016); Verified Complaint for Declarative and Injunctive Relief. Online at <https://tinyurl.com/lmpkrko>.



# Bail Reform in New Jersey

**Hon. Stuart Rabner** Chief Justice, New Jersey Supreme Court

Many defendants who pose no real threat to public safety languish in jail pretrial because they cannot afford bail. New Jersey is using a risk-assessment system, rather than monetary bail, to determine whether defendants should be held in jail before trial.



Before signing the Bail Reform Act of 1966, President Lyndon B. Johnson spoke of the need to reform a justice system in which some criminal defendants could post bail and buy their freedom while others would languish in jail before trial—not because they were guilty or likely to flee, but because they were poor. The scales of justice, Johnson observed, were weighted “not with fact, nor law, nor mercy,” but with money.

A half century later, that problem is still with us. As recently as 2012, a study of New Jersey’s county jail population revealed that one in eight inmates were in jail because they could not make bail of \$2,500 or less. They did not pose a risk of danger or flight but sat in jail because they did not have enough money to post even a modest amount of bail.

Meanwhile, defendants who posed serious risks to public safety could be released if they had access to money.

In 2016, as in 1966, money typically decided who was released before trial and who sat in jail until trial began.

*“Criminal justice reform in New Jersey has had broad-based support. In 2012, the governor publicly called for an amendment to the state constitution to allow for pretrial detention. In 2013, the judiciary formed the Joint Committee on Criminal Justice, composed of representatives from all three branches of government.”*





## There is a better way.

On January 1, New Jersey's criminal justice system started to adapt to its most significant transformation in decades. We shifted from a system that relied heavily on monetary bail to one that objectively measures the risk defendants pose on two levels: Will they show up for trial? Will they commit a crime while on release? Under the new risk-based system, those who present a substantial risk of danger or flight can be detained pending trial. Those who do not will be released on conditions that pretrial services officers will monitor.

Why does this matter? Because whether a defendant is released pretrial is one of the most significant decisions in the criminal justice system. There are real consequences for poor defendants, often members of minority groups, who pose little risk but sit in jail for weeks and months while they are presumed innocent. During that time, they may lose jobs when they fail to show up for work. They may lose contact with family members. They may lose custody of children. And the cost to taxpayers to house a low-risk defendant can amount to \$100 or more per day.

In his speech in 1966, President Johnson cited examples of how the bail system punished people simply for being poor. Johnson recalled a defendant who spent two months in jail and lost his job, his car, and his family, only to later win an acquittal. Another defendant spent 54 days in jail because he could not post \$300 bail for a traffic offense that carried a maximum sentence of five days.

Time spent in jail can also become an incentive for a defendant to plead guilty and receive a sentence for time served. Studies show that defendants held pretrial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released pretrial.



The consequences are equally grave at the other end of the spectrum. Some defendants charged with serious offenses pose a great risk that they will commit new crimes or try to intimidate or retaliate against witnesses. Their pretrial release raises a genuine concern about public safety.

For those and other reasons, a national movement is underway to reform the criminal justice system, and New Jersey has been active in a number of ways.

Criminal justice reform in New Jersey has had broad-based support. In 2012 the governor publicly called for an amendment to the state constitution to allow for pretrial detention. In 2013 the judiciary formed the Joint Committee on Criminal Justice, composed of representatives from all three branches of government. The committee's 33 members included the attorney general and county prosecutors, the public defender and private defense attorneys, counsel for the ACLU, judges, and staff. A year later, many of the committee's recommendations were adopted by the legislature, with the strong backing of the senate president and the assembly speaker, and signed into law by the governor.



The public took the next major step. In November 2014 more than 60 percent of New Jersey voters approved a constitutional amendment that gave judges, for the first time, the ability to detain defendants to ensure their appearance in court and protect the safety of the community.

Since then, all parts of the criminal justice system have been hard at work to make reform a reality. A risk-assessment tool has been developed in partnership with the Laura and John Arnold Foundation; that tool has been validated with data from thousands of actual New Jersey cases. Pilot programs in three vicinages trained staff and tested new technology. The supreme court adopted court rules to implement the law. The attorney general issued guidelines to law enforcement statewide. And the administrative director of the courts, public defender, director of the Division of Criminal Justice, and others led 15 seminars for a total of more than 3,000 county officials throughout the state to train stakeholders about the new law and foster coordination across the justice system.

### Here is how it will all work.

On January 1, the court system began using the risk-assessment tool to help judges make more informed decisions about pretrial release. To predict whether a defendant poses a low, moderate, or high level of risk, pretrial services officers now review each defendant's criminal history, record of prior court appearances, and other objective information—as they will in an estimated 50,000 cases per year. Officers then make a recommendation to the judge.

Most defendants will be released pretrial on a range of conditions that will not include money bail. For low-risk defendants, the court may simply direct an officer to send a text message or place a phone call to remind defendants when they must appear in court. Defendants who pose greater risks may be placed on electronic monitoring. Those considered a serious threat to public safety or risk of flight will be detained. Judges can also modify conditions of release based on new circumstances.

# Trends in the U.S.

## New Mexico Denial-of-Bail Measure

In November 2016, New Mexico voters approved Constitutional Amendment 1, which allows courts to deny bail to a defendant charged with a felony if a prosecutor shows evidence that the defendant poses a threat to the public, while also providing that a defendant cannot be denied bail because of a financial inability to post a bond.

See “Constitutional Amendment 1,” at <https://tinyurl.com/ly55yhd>.



Defendants who are detained will be subject to the new law's speedy trial provisions, which impose time limits for when a defendant must be indicted and when a trial must begin.

In recent years, some jurisdictions have successfully implemented a risk-based approach. In Lucas County, Ohio, for example, nearly twice the number of defendants are being released pretrial on conditions without bail. During that time, the percentage of defendants who skipped a court date has been dramatically reduced, and the number of defendants arrested while on release has been cut in half. The rate of violent crimes committed by defendants on pretrial release has also gone down.

Like all changes, the reforms underway will be hard to achieve. They will succeed only with the continued cooperation among partners throughout the criminal justice system and the continued support of all branches of government. We have made great strides—collectively—so far, and there is more work ahead of us.

Together, we can build a better, fairer, and safer system of criminal justice.



# Controlling the Message in Times of Court Challenges

**Beth S. Riggert**

Communications Counsel, Supreme Court of Missouri  
President, Conference of Court Public Information Officers

Distrust of institutions is increasing, traditional media are losing prominence, and people are retreating into “echo chambers” reinforcing existing beliefs. Courts must adopt modern communication strategies to tell their own stories through focused, consistent messages that connect their important work with the values of the people they serve.

Historically, court communication consisted almost entirely of issuing decisions, geared toward a legal audience, explaining how a court resolved a dispute brought before it. Over time, however, courts began to learn that while “the opinion speaks for itself,” the public does not necessarily understand the legal language used. And courts learned people do not trust what they do not understand.

In the absence of information from courts themselves, the public turned elsewhere for

understanding—in many cases, entertainment shows such as *Law and Order*, *The Good Wife*, and the wide array of “reality judge” shows. But it does not help courts if the public believes all criminal cases will include compelling DNA analysis or expect all attorneys to finish their closing arguments in 60 seconds or less.

To help fill that information void and dispel myths, many courts have made their work more accessible to the public through plain-language summaries of pending cases and decisions,

websites, cameras in courtrooms, and events. Courts and judges increasingly are harnessing the power of social media. Some, like Texas Supreme Court Justice Don Willett, have developed huge Twitter followings (@JusticeWillett; available at <https://twitter.com/justicewillett>). More judges and court staff are engaging with students and adults alike through civic education programs designed to foster understanding of the importance of the third branch of government. Increasingly, courts have hired public information officers to manage their communications and outreach efforts. One longtime court leader, Supreme Court of Missouri Clerk Thomas F. Simon, often said you cannot blame the public for getting things wrong if you are doing nothing to help them get it right.

Efforts to help people better understand their courts appear to be working. A September 2016 Gallup poll found those expressing a “great deal” or “fair amount” of trust and confidence in the judicial branch had recovered to 61 percent (Saad, 2016). The National Center for State Courts’ most recent State of State Courts report offered even better news—74 percent of voters surveyed expressed confidence in their state courts. A large majority said they believe their state courts protect individual and civil rights; treat people with dignity and respect; and provide procedural fairness, regardless of outcome.

## Communication Challenges

While it is important for courts to communicate about their day-to-day work, it is equally important for people to understand the challenges courts face. Ideally, courts not only want the public to understand the important work they do, but also want the public’s support when courts are facing challenges or crises. This requires a different level of effort: As communications experts long have preached, it is easy to impart knowledge, it is more difficult to impact attitudes, and it is an even harder task to change behavior or move people to action.

This is even more difficult now, as the ways people obtain information and their attitudes about their government institutions transform. The 2017 Edelman Trust Barometer, which measures global



trust in institutions including government, identified a marked shift from trust in established authority to trust in “average” people. It similarly found a fundamental shift from the “old model” of elites managing institutions to do things “for the people” to a “new model” of institutions working “with the people.” Among those who say institutional systems are failing, about two-thirds believe having open and transparent practices and listening to customers can help build trust.

The barometer also measured shifts in what communication channels people trust. It found people are more likely to turn to search engines than human editors to find information and are nearly four times more likely to ignore information supporting a position they do not already believe. They prefer communication from spontaneous, blunt, and outspoken speakers drawing from personal experience over rehearsed, diplomatic, and polite speakers drawing from data. They are far more likely to believe leaked information than an institutional news release. They find most credible communication from “a person like yourself” (tied with technical or academic experts), followed by employees and activists.

## Communication Solutions

Findings like these can help courts develop new ways to maintain credibility as trustworthy sources of information in a society that is increasingly distrustful of institutions. Such findings also can help courts better understand their audiences and build messages tied into the public’s existing sense of personal and community values. As in sports, the best defense is a good offense—the more citizens appreciate the value of fair and impartial courts in their lives, the more understanding and supportive they will be when courts face challenges or crises.

Courts also can learn communications lessons from the business sector, including the importance of accepting responsibility for a problem, taking tangible steps to fix problems, and apologizing



*"[I]t is important that communications by all courts be consistent not only with its message but also in the manner information is communicated.... This consistency is designed to improve understanding and reduce misperceptions about the judicial system, which often stem from a lack of necessary information."*



for any harm a problem has caused. Such a response might make litigation counsel cringe, but even in our litigious society, sometimes all people want is a meaningful apology and acceptance of wrongdoing. Embracing private-sector management models also can be helpful. By breaking down natural silos, courts can build collaborative, multidisciplinary teams of court leaders—including judges, administrators, legal counsel, and public information officers—dedicated to consistent, effective communication.

These collaborative teams must have diversity of experience, as well as the authority to respond swiftly when challenges arise. Courts must strive to produce truly rapid responses, not micromanaged messages that take days or even weeks to develop. By then, the information cycle will have moved on, and public perceptions already will be shaped without the benefit of the court's message. As any judge who has tried a high-profile case can attest, public perceptions begin to be shaped as soon as news of a case breaks. Neither the media nor the public will heed the judge's instructions to wait until all evidence has been presented and all arguments have been made to begin forming their opinions. Instead, without a concerted strategy by defendants, the first to the courthouse typically claimed the advantage in perception, as media tend to shape their stories based on the first allegations made in a case, typically by prosecutors or plaintiffs.

One state that has institutionalized the importance of court communications is Florida, which last year finished a lengthy strategic planning process to develop a communication plan for its entire judicial branch (Supreme Court of Florida, 2016). As Florida Chief Justice Jorge Labarga explained, "[I]t is important that communications by all courts be consistent not only with its message but also in the manner information is communicated. . . . This consistency is designed to improve understanding and reduce misperceptions about the judicial

system, which often stem from a lack of necessary information" (Labarga, Richardson, and Knox, 2016).

A unified approach to communications can work even in a state without a unified court system. For example, the Supreme Court of Ohio has partnered with Ohio Government Telecommunications to run a multimedia news service called Court News Ohio (<http://www.courtnewsOhio.gov/>). An authoritative source for information about cases, judges, and other news by and about the Ohio judicial branch, this service is designed to reach not only the media but also the public.

Communications for courts must be designed for both long- and short-term effectiveness. Day to day, courts can develop their opportunity to become active storytellers and not rely on traditional media to tell their stories for them. Courts must ensure their key facts and messages are used consistently in all communications with the media, legislators, community leaders, and the public. In today's increasingly technological society, courts also should hone those messages into easily understood 140-character bites, photographs, and videos suitable for dissemination across traditional and social media alike. Courts must communicate as much with their internal audiences as their external audiences. With appropriate nurturing, judges and staff can become effective grassroots messengers to help explain the courts to their friends and throughout their communities. Courts also must keep their community partners in the loop—retired judges and staff, attorneys, professors, business or religious leaders, and anyone else to whom the public already gravitates to shape local opinions. This groundwork becomes a springboard from which a court can respond when challenges arise. It is important to communicate quickly, even if all the answers are not yet known. When a court is facing a developing situation or a problem requiring deliberative



study to craft long-term solutions, communications can be the key in managing the public's expectations, both in explaining the process and in consistently making updates as appropriate.

### Case Studies in Effective Court Communications

The nation's heartland offers examples. After losing three justices in a retention battle over a social issue, Iowa quite literally took its supreme court on the road, with justices hearing cases and meeting with the public in towns throughout the state. Now, in the face of a significant state budget shortfall, the Iowa Judicial Branch is speaking directly to the people to explain how the courts' budget works and the steps the courts are taking to reduce spending while minimizing disruption of services to Iowans (Iowa Judicial Branch, 2017).

In Kansas, years of clashes between the legislative and judicial branches, largely over funding for the state's public schools (Caplan, 2016), came to a head last year during a concerted effort to oust four of the high court's justices on November's ballot. As one newspaper headline explained, "Kansas Supreme Court justices face anger ahead of retention elections later this year" (Shorman, 2016). As the election drew closer, another newspaper's editorial urged voters to "reject ugly political attacks" and retain the justices (Editorial Board, *Kansas City Star*, 2016). The justices took to the road, holding court in schools in the state and speaking with the public. They also appeared on local television talk shows to discuss their work, and the chief justice welcomed an in-depth feature story in which he spoke candidly about the challenges his branch had been facing (Novascone, 2016). Four former governors came to the justices' defense (*Eagle* Editorial Board, 2016). And the response? In November 2016, all the justices were retained (Zeff, 2016).

Across the border in Missouri, the judiciary in rapid succession faced two critical reports by the U.S. Department of Justice (DOJ), one about a county's juvenile system and the other about the municipal division in Ferguson, which had found itself in the nation's spotlight after a young black man was shot to death by a white police officer.



Even before the DOJ released its Ferguson report, the Supreme Court of Missouri committed itself to restoring trust in all the state's municipal divisions and began taking steps to regain public confidence. While media and public attention was laser-focused on St. Louis County's 80-plus municipal divisions, the court recognized that any solutions devised would affect more than 600 municipal divisions statewide. It also understood that reviewing municipal divisions statewide and devising meaningful statewide improvements could not—and *would* not—be done in haste.

Days after the DOJ report was released, an appellate judge with vast municipal experience was assigned to hear all of Ferguson's cases and was authorized to implement needed reforms to its policies and procedures. Local radio called the court's action "decisive and unexpected" and said experts believed it had created momentum toward major reform (Freivogel, 2015). Local and national media observed the assigned judge hold his first docket in Ferguson. As one news report noted, it "began with a message: changes are underway" ("New Judge Holds First Ferguson Municipal Court Session," 2015). Frank and plainspoken, the judge demonstrated a properly functioning municipal docket, treating all defendants fairly and courteously and making sure they understood their rights. In so doing, he began to change that court's culture. The response largely was positive. One defendant told the media the judge stuck to the law, was like an "old professor," and seemed friendly and down-to-earth ("New Judge Sits Behind Ferguson Bench," 2015). A national headline proclaimed, "State Judge Ushers in New Era at Ferguson Municipal Court" (Kesling, 2015).

The Supreme Court of Missouri then began the arduous process of developing long-term improvements. It appointed a work group whose members performed yeoman's work, turning recommendations for reform into tangible change. It held forums to hear the public's concerns and ideas. It also consistently communicated—with the media, the legal community, and the public—that there was a process in place, and the process would take longer than some might hope, but the process nonetheless was important to making meaningful change. The chief justice also used her annual addresses to the legislature and the bar to provide updates about the changes put in place, what work remained to be done, and where the courts needed assistance from the public and legislature.

Like her sister states, Missouri's courts continually strive to improve. As Missouri Chief Justice Patricia Breckenridge told the state's legislature in her 2017 state of the judiciary address, "Do not view . . . calls for action as a condemnation of our judicial system. Our citizens can be proud of our courts, where they go to resolve their disputes peaceably and where their constitutional rights are protected. Day in and day out, in the courtrooms in your communities, hundreds of thousands of cases are adjudicated without fanfare. We, more than anyone, want our courts to live up to their responsibilities to properly administer justice" (Breckenridge, 2017).

Throughout her two-year term as chief justice, Breckenridge stressed key messages about the courts. She demonstrated that experts within the judicial and legal communities will take ownership of problems, work hard to find practical solutions that make Missouri's courts better for everyone, and stand together in ensuring the culture of our profession is one that earns the public's trust and confidence (Breckenridge, 2016).

By building on positive messages like these about the important work they do, courts throughout the country can become more adept at telling their own stories and can help shape national public discourse for years to come.

## References

- P. Breckenridge (2017). "State of the Judiciary." Speech, Jefferson City, Missouri, January 24. Online at <https://tinyurl.com/kklxcz4>.
- (2016). Opening Luncheon Address at the Missouri Bar/Judicial Conference Annual Meeting. Lake Ozark, September. Online at <https://tinyurl.com/mdtk6od>.
- L. Caplan (2016). "The Political War Against the Kansas Supreme Court." *New Yorker*, February 5. Online at <https://tinyurl.com/kz3sg82>.
- Edelman Trust Barometer (2017). "Executive Summary." Online at <https://tinyurl.com/m2nbtck>.
- Eagle Editorial Board (2016). "Governors Are Correct: Retain Supreme Court Justices." *Wichita Eagle*, September 9. Online at <https://tinyurl.com/mrnqzxb>.
- Editorial Board (2016). "Reject Ugly Political Attacks in Kansas and Retain Supreme Court Justices." *Kansas City Star*, August 27. Online at <https://tinyurl.com/nyzlojl>.
- W. H. Freivogel (2015). "Experts Say Municipal Court Reforms Are Coming, but Don't Know How or What." St. Louis Public Radio, March 10. Online at <https://tinyurl.com/kkxyhpc>.
- Iowa Judicial Branch (2017). "Five Facts About the Iowa Judicial Branch." FY 17 Budget. Online at <https://tinyurl.com/lisrajy>.
- B. Kesling (2015). "State Judge Ushers in New Era at Ferguson Municipal Court," *Wall Street Journal*, March 20.
- J. Labarga, N. A. Richardson, and T. Knox (2016). "Should I Tweet That? Court Communications in the 21st Century." In C. R. Flango, D. W. Smith, C. F. Campbell, and N. B. Kauder (eds.), *Trends in State Courts 2016*, pp. 67-73. Williamsburg, VA: National Center for State Courts. Online at <https://tinyurl.com/k3dyfkn>.
- "New Judge Holds First Ferguson Municipal Court Session Since DOJ Report" (2015). KMOV-TV, March 20. Online at <https://tinyurl.com/kb7a744>.
- "New Judge Sits Behind Ferguson Bench" (2015). KMOX, March 20. Online at <https://tinyurl.com/kwq9vx9>.
- D. B. Novascone (2016). "When the Bench Becomes a Hot Seat." *Kansas Leadership Center Journal*, June 3. Online at <https://tinyurl.com/mss3gge>.
- L. Saad (2016). "Americans' Confidence in Government Takes Positive Turn." Gallup, September 19. Online at <https://tinyurl.com/mu8uayq>.
- J. Shorman (2016). "Kansas Supreme Court Justices Face Anger Ahead of Retention Elections Later this Year." *Topeka Capital-Journal*, February 13 (updated February 15). Online at <https://tinyurl.com/k59r3eh>.
- Supreme Court of Florida (2016). "Delivering Our Message: Court Communication Plan for the Judicial Branch of Florida." Florida Supreme Court Public Information Office, Tallahassee, January. Online at <https://tinyurl.com/k4shtxt>.
- Supreme Court of Missouri (2012). "Retired Supreme Court Clerk Thomas F. Simon Dies." Press release, November 19. Online at <https://tinyurl.com/n2253az>.
- S. Zeff (2016). "All Kansas Supreme Court Justices Retained." KCUR 89.3, November 9. Online at <https://tinyurl.com/kjgr9v5>.



# View from the Michigan Bench

**Hon. Elizabeth Hines** Judge, 15th Judicial District, Ann Arbor, Michigan

Many state and local governments require courts to collect supplemental assessments from offenders, which indigent offenders often cannot afford. A Michigan judge gives her perspective on how judges can promote accountability without punishing the poor.

District courts in Michigan serve as the emergency room of the court system. In one day, I can hear cases ranging from “Possession of a Skunk Without a Permit” to “Murder.” When sentencing, the best judges do not just process cases, but try to help people address the underlying issues that contributed to their conduct, including drug and alcohol addiction, mental illness, domestic violence, PTSD, and homelessness.

But there are days I feel like a tax collector.

---

*If a person truly has no ability to pay, we cause a lot of angst and waste a lot of court and staff time and money chasing down fines and costs we know we will never collect.*

---





## The Problem: High Costs, “Hidden” Assessments, and Fees

Fines, fees, costs, and assessments judges impose at sentencing have become increasingly expensive and unaffordable to many. The financial component of Sarah K.’s drunk-driving sentence in Michigan, for example, exceeds \$1,400.<sup>1</sup> In part, that is due to minimum state “assessments” (currently \$125 for misdemeanor convictions in Michigan) that judges are required to impose *in addition* to any fines and costs. Michigan requires a minimum assessment for traffic cases, too.

Michigan is not unique. Legislators across the country know they do not have to raise taxes to fund programs; they can simply mandate that courts collect additional “assessments” from the people they sentence, or direct that portions of fines be applied to the programs legislators choose to support. While those programs may be valuable, they are often unrelated to the conduct that brought the person to court in the first place (Hogg, 2011). When James W. pleads guilty to “Driving Without a Valid Operator’s License on His Person,” it is unlikely anyone is aware that a portion of the fines and costs he is ordered to pay may be used to support libraries, the Crime Victims’ Rights Fund, retirement plans for judges, or, in one state, construction of a new law school.<sup>2</sup>

“It’s expensive to be poor,” our local prosecuting attorney once observed. For the person who cannot afford to pay the initial fines, costs, and assessments ordered by the court, there are even more financial penalties due later. If fines and costs are not paid in full within 56 days of the due date, a “late fee” of 20 percent must be added, per Michigan law.



There is a “default fee” if a person failed to respond to a civil infraction. There is a mandatory driver’s license suspension for “failing to comply with judgment,” i.e., pay a traffic ticket, and a Michigan Secretary of State fee to “clear” the suspension when the court fines and costs are ultimately paid, plus an additional \$125 fee to have a driver’s license “reinstated.” Other states have similar mandatory fees, costs, and assessments. Some courts even charge fees for payment plans. Indigent defendants may be required to pay a fee for their court-appointed attorney.

While everyone needs to be held accountable for illegal behavior, I have not seen any evidence that overwhelming people with debt they cannot realistically ever hope to repay has a deterrent effect. But there is plenty of evidence to suggest it reinforces a cycle of poverty and diminishes trust and confidence in the courts.

Something needs to be done. Our present course undermines the integrity of the justice system.

<sup>1</sup> The financial component of a sentence in 15th District Court for Operating While Intoxicated, first offense, most often includes \$825 fines and costs, \$360 probation-oversight fees (\$30 per month for 12 months of probation), the mandatory \$75 to the Crime Victims’ Rights Fund, the mandatory \$50 state assessment, and a \$100 “police recovery fee” the court collects and gives to the arresting agency as allowed by law. In addition, the defendant will most often be required to pay for court-ordered drug/alcohol testing and fees for any rehabilitative programs ordered by the court.

<sup>2</sup> Case examples are based on actual court cases in the 15th District Court, but names have been changed to protect the identities of individual defendants.



## The Dilemma Judges Face: Pressure to Collect and the Consequences for the Poor

Judges across the country face pressure to collect. A portion of the money collected by limited-jurisdiction and municipal courts is returned to the local government units that fund courts. State court administrative policies often measure and may publish courts' collection rates. The National Center for State Courts (NCSC) has "tools" used nationwide to measure and improve court performance. Collection rates are a performance measure. The pressure on judges to collect has real consequences for people involved in the court system. Failure to pay or appear in court often results in a warrant and jail.



"Because I didn't have the money." That's the number-one reason people give for failing to appear in court. Per Michigan state court administrative policy, judges repeatedly indicate on court notices and documents that payment is due at the time of assessment "except for good cause shown." But people who cannot afford to pay are often afraid they will go to jail if they appear in court, and with good reason. Across the country, there are horror stories of poor people who were jailed because they were unable to pay their court-ordered financial obligations.

In Michigan in 2014, for example, David Stojcevski, 32, was sentenced to 30 days in jail for missing a court appearance on a careless-driving charge and failing to pay \$772 in fines related to the civil infraction. He died in jail (Hall, 2016). While that is an extreme example, the devastating impact on the lives of individuals unable to pay and their families has been the topic of recent media stories and the U.S. Department of Justice report on the practices in Ferguson, Missouri. Going to jail for even a short time may cause the person to lose a job and the family's housing, to say nothing of the person's self-esteem. It no doubt breeds contempt for a court system already not trusted by many.

Judges should not be jailing people who do not have the money to pay. More than 30 years ago, the U.S. Supreme Court made clear in *Bearden v Georgia*, 461 U.S. 660 671-72 (1983), that courts may not incarcerate someone for failure to pay without first holding a hearing and making a finding that the failure to pay was willful and not due to an inability to pay. Courts may incarcerate a person who cannot pay, despite having made bona fide efforts to pay, "only if alternative measures are not adequate to meet the State's interest in punishment and deterrence" (*Bearden* at 673). "Alternative measures" include an extension of time to pay or a reduction of the amount owed (*Bearden* at 671-72). These straightforward alternatives are almost always available to the court. Thus, jailing should *never* be the result if a person cannot afford to pay a traffic ticket or fines and costs for a misdemeanor. There are more just and effective alternatives to accountability than jail. Even ignoring the human cost and using a purely financial analysis, jail does not make sense. Jail is expensive, often \$60-90 per day. The cost to taxpayers of jailing a person who cannot afford to pay fines, costs, and assessments often ends up being higher than the amount owed.

# Trends in the U.S.

## Michigan's Online Resolution of Certain Tickets and Violations

A professor at the University of Michigan Law School created software allowing courts and defendants to resolve minor violations completely online. The online resolution process increases access to the courts by creating an alternative to physically going to court.

See <http://getmatterhorn.com/>



## First Judicial District of Pennsylvania's Financial Information Form

The First Judicial District of Pennsylvania created a Financial Information Form that defendants bring to payment-plan conferences or to hearings, along with proof of income, so the court may determine ability to pay in an informed and equitable way.

See "First Judicial District of Pennsylvania Financial Information Form," online at <https://tinyurl.com/mrcub72>.



## Judges as Leaders: Promoting a Smart, Fair, and Equitable Justice System

In all affairs, it is healthy now and then to hang a question mark on things that have long been taken for granted. That question mark has deservedly been hung on the practices judges use to impose and collect fines, fees, and costs. The good news is that although judges have contributed to the problem, they are also able to fix it. Judges across the country are doing just that.

In 2014 Ohio Chief Justice Maureen O'Connor warned all judges in her state to stop jailing indigent defendants for failing to pay (Spillane, 2016).

She now co-chairs the National Task Force on Fines, Fees and Bail Practices, a joint effort of the Conference of Chief Justices and Conference of State Court Administrators, sponsored by the State Justice Institute and coordinated by the National Center for State Courts (NCSC), to address these critical issues (See M. O'Connor and L. K. Dudgeon, "The Work of the National Task Force on Fines, Fees and Bail Practices," *Trends in State Courts* 2017, pp. 59-62). NCSC revised its measurement tool for collections to make sure courts comply with *Bearden* (see R. Schauffler and B. Ostrom, "ReTooling *CourTools*: Legal Financial Obligations and the New Measure 7," *Trends in State Courts* 2017, pp. 44-47). The Michigan Supreme Court recently adopted a simple court rule, MCR 6.425(E)(3), that clearly embodies the ability-to-pay requirements of *Bearden*. Even as judges in municipal and general- and limited-jurisdiction courts await additional, formal direction by their chief justices through the work of the National Task Force, there are practices they can employ now.

Judges can practice procedural, as well as actual, fairness. The basics—treating people with respect, listening to them, making eye contact, encouraging questions, not shaming people when they do not have the resources to pay—may improve collection rates and increase respect for the court. Research shows that people are more likely to comply with a court order, even one with which they disagree, if they feel they were treated fairly and with respect (Burke and Leben, 2007). Good, friendly customer service from the clerk's office—a tone judges can set and prioritize—is important, too. Consider establishing a policy where people may contact the court online, in writing, or by phone to get an automatic one-time extension to pay civil infractions without having to appear in court. Accept partial payments so the person may chip away at the debt in affordable increments, rather than trying to come up with the total amount all at once. Make it convenient to pay in person, by mail and online and with cash, check, money order, and credit or debit card.

Judges can also try to determine a person's "ability to pay" respectfully, without assumptions based on how the person looks in court.



The assumption that a person who has manicured nails or is wearing a Ralph Lauren polo shirt can pay may be false. Of course, it is possible the individual's financial priorities are not what the judge trying to collect thinks they should be. But it is also possible the person has exchanged services for the manicure, purchased the designer shirt at a thrift shop or Kiwanis sale, or received either as a gift.

Respect for the justice system is earned, not given. Judges can collect reasonable economic sanctions in a dignified and respectful way.

### **Solutions in Action: Promoting Accountability Without Punishing the Poor**

In my experience, alternative sanctions may accomplish better accountability than imposing financial obligations a person cannot afford to pay, depending on the individual's circumstances. If ordered to pay \$150 for committing a civil infraction, for example, many of us can easily write a check or use a credit card. For a person making minimum wage and trying to support a family, or someone who is unemployed, homeless, or facing eviction, \$150 might as well be \$150,000.

Allowing a fair alternative to paying money the person does not have, and is not likely to get, allows a person to pay “in a different form of currency.”<sup>3</sup> It is not a “free ride.”

The temptation in the judicial quest to be evenhanded is to treat everyone the same. One size may fit most, but not all. This is particularly true of community service. Community service credited at a fair rate may be a good, achievable, effective alternative to jail or a monetary sanction for some people, but it is not a panacea. Any disabilities, driving restrictions, transportation limitations, caregiving, or employment responsibilities may make community service unrealistic. For a person working two jobs and supporting five children, or attending school and working, or caring for elderly parents or special-needs children, there is no time for community service. For some, however, community service is helpful and may even lead to employment. If judges allow the person a choice to work in a field about which he or she is passionate, it almost always increases feelings of self-worth and connection to the community (Ability to Pay Workgroup, 2015: Appendix I). Of course, the number of community-service hours ordered needs to be reasonable to complete and proportionate to the amount owed.

3 Steve Binder, San Diego assistant public defender, an expert on homeless courts.



Judges can learn from the experience of drug courts and other problem-solving courts how to devise fair and just alternatives to monetary sanctions and jail. There may be a more creative and effective option to achieve the court's goal in punishment and deterrence in an individual case. Accepting credit for obtaining a GED or passing grades in school, or for participating in drug treatment or mental-health counseling the person agrees is needed, may be a "win/win" situation to "pay" the debt.

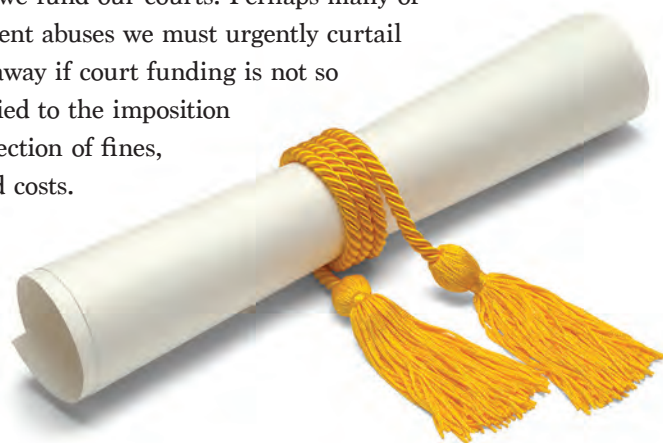
Setting an expectation of payment at the time of assessment no doubt increases collections, but the court must offer clear and widely known alternatives to payment or jail for people unable to pay at that time so they are not afraid to come to court. In my experience, most people pay as soon as they can. They do not want to have to come back to court. They do not want to perform community service. If a person is unable to pay at the time of assessment, I ask the person how much time is needed to pay. Establishing a reasonable, realistic payment plan that the person feels he or she can manage elicits better compliance than requiring full payment at sentencing from people who cannot afford to pay. Simply extending the due date as needed, so the person has not "failed to comply with judgment," avoids a mandatory driver's license suspension and additional financial penalties otherwise automatically triggered in many states. My experience has been, contrary to myth, that most people *want* to pay their debts. Indeed, many people thank me in open court for giving them time to pay on a schedule that works with their financial ability and needs.

Finally, in limited-jurisdiction courts there are cases like Sophia M., the unemployed, homeless, single mother of three young children with special needs convicted of "Retail Fraud," and Christopher J., who is undergoing chemotherapy and just lost his job but still owes money for a civil infraction. Justice demands that judges reduce or waive fines, costs, and assessments in such cases.

## Conclusion: Stemming the Problem Before It Starts

One definition of "insanity" is doing the same thing over and over and expecting a different result. Should we not consider each person's ability to pay at the time fines and costs are imposed? Does it make sense, and is it just, to routinely assess the same \$450 fines and costs for every "Retail Fraud" misdemeanor, regardless of whether the person who must pay is a college student who stole for a thrill, or a homeless mother who was caught stealing baby clothes and formula for her child? If a person truly has no ability to pay, we cause a lot of angst and waste a lot of court and staff time and money chasing down fines and costs we know we will never collect.

Ultimately, we need to hang a big question mark on how we fund our courts. Perhaps many of the current abuses we must urgently curtail will go away if court funding is not so closely tied to the imposition and collection of fines, fees, and costs.



## References

- Ability to Pay Workgroup (2015). "Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay." Report, Michigan Supreme Court and Administrative Office of the Courts, April 20.
- K. Burke and S. Leben (2007). "Procedural Fairness: A Key Ingredient in Public Satisfaction." White paper, American Judges Association, September 26. Online at <https://tinyurl.com/md3lbsd>.
- C. Hall (2016). "Feds: No Criminal Wrongdoing in Macomb County Jail Inmate's Death." *Detroit Free Press*, September 19.
- D. A. Hogg (2011). "District Court Tax Farming: Are Judges the New Publicans?" 90:2 *Michigan Bar Journal* 28.
- E. Spillane (2016). "Why I Refuse to Send People to Jail for Failure to Pay Fines," *Washington Post*, April 8. Online at <https://tinyurl.com/lwo755h>.





# View from the Texas Bench

**Hon. Ed Spillane** Presiding Judge, College Station Municipal Court, Texas

Indigent defendants often face court fines and fees they simply cannot afford, thus making them afraid of arrest should they come to court. A Texas judge shares his perspective on what judges can do to help indigent defendants meet their obligations and never return to court again.

One of the timely issues facing any municipal court judge or magistrate is the placement of indigent defendants in jail for fine-only offenses. On an average day in College Station, Texas, I see numerous defendants on a live feed from the jail. During that time, I review their charges, set bond, and often release them to pursue the proper alternatives defendants legally deserve: an indigency hearing. If I find him or her to be indigent, I then provide a chance to pursue an alternative sentence to paying a fine.

Mark S. is a typical defendant in my court. He failed to appear in court out of fear of being arrested after receiving citations for speeding and improper headlights. He received two failure-to-appear charges as well. A college intern at our court reached Mark and told him to come to court. She promised him if he came to court, he would not be arrested.

---

*Giving defendants an opportunity to settle their cases translates to future good citizenship.*

---

Mark arrived at court; was immediately given a payment-plan application after he decided to plead no contest to the four charges; and met 15 minutes later with Abby, our payment-compliance officer, who recommended community service. Why? His fines and court costs totaled \$1,500. Mark was a graduate student who had a full-time job, wife, and small child. For Mark, \$1,500 might as well have been \$15,000. He is now working on community service and balancing this punishment with his job and family obligations.

# Trends in the U.S.

## Biloxi Municipal Court Procedures

The Biloxi Municipal Court created procedures for handling legal financial obligations and community service. The procedures allow for the discharge of fines, fees, state assessments, court costs, or restitution owed to Biloxi to be accomplished through community service.

See “Exhibit 1: Biloxi Municipal Court Procedures for Legal Financial Obligations and Community Service,” online at <https://tinyurl.com/kfplufh>

[illegible]

What can judges in state courts do? We see the entire community from juveniles to elderly defendants. Most judges I meet want to achieve one goal: make sure defendants do not return to court again with new charges in the most fair, legal, and efficient way possible.

First, judges must set an indigency hearing as soon as possible for defendants who cannot pay immediately. Every defendant who cannot pay on the day of sentencing completes a payment-plan application. This settles the issue very quickly and early in the process. We have payment-compliance officers at our court skilled in meeting with defendants at any time our court is open. Defendants can also write to me or see me in a set arraignment should they want to speak to me directly.

What are alternatives to paying a fine? We know from *Tate v. Short*, 401 U.S. 395 (1971), that the Supreme Court was very open to a variety of options: payment plans, community service, and educational opportunities. It is up to the various courts in our many states to find a solution that enhances the outcome we all seek: defendants not reoffending. Legislators play a role in this creative process.

There are numerous ways legislatures can ensure indigent defendants are treated justly. Driver's license surcharges should be eliminated for traffic-offense convictions, particularly those involving possessing insurance, driving with a suspended license, or having defective equipment. These surcharges often create a bottomless hole of debt indigent defendants are unable to ever satisfy. Many give up and do not come to court. Surcharges often affect courts, but courts have little control over them since they are administered by the highway department or another office other than the court hearing the offenses. Legislatures also could provide for lower court costs, which are so high they dwarf the fine amount and go to the state general-revenue fund. In Texas an average traffic case comes with a \$100 court cost that must be paid before the fine. Finally, the legislature could provide for courts being a "safe haven" where defendants are not arrested on minor warrants if they come to court and cooperate.

In Mark's case, and those of thousands of defendants nationally like Mark, going to jail is not the solution. Many judges across the country face the challenge of indigent defendants in their jails. Other external factors often help put these defendants in jail. Many of these cases involve minor, fine-only ticket offenses, like traffic offenses, driving without insurance or with an invalid license, or faulty car equipment. Convictions in these cases or failing to come to court result in a driver's license suspension and new charges, including an arrest warrant. Indigent defendants find this cycle to be overwhelming, and often at some point choose to ignore the criminal justice system because they want to keep their job and need to drive to work. The state will then impose added surcharges independent of court fines that the defendant must pay to remove the driver's license suspension. A \$200 citation becomes a \$2,000 obligation that for many indigent defendants might as well be several million dollars.

I have sentenced defendants to community-service projects throughout not just my community, but in other communities where they live should they be visiting College Station when they committed their offenses. Teen court, GED tutoring, anger-management assistance, first-offender classes, city-ordinance review on being a good neighbor at the local university, and educational sessions on the effects of drunk-driving accidents on their victims are all programs that can be, in my experience, more effective alternatives to paying a fine or going to jail.

Judges can also waive fines and court costs should a defendant be indigent and if performing community service would be an undue burden. I have waived the fine and court costs in cases where the defendant is in the penitentiary, cannot perform community service due to a mental or physical disability, is overwhelmed by the full-time duties of parenting and working yet still indigent, or suffering from a terminal illness. Giving defendants an opportunity to settle their cases translates to future good citizenship.



However, what about the defendant, Lisa K., who I see in jail due to her never coming to court out of fear of being arrested? Our courts can have incredible programs to help indigent defendants, but if they refuse to come to court, nothing we offer can help. We send post cards, have interns call defendants who have failed to appear, put a hold on renewing their driver's licenses if they do not appear, and, as a final step, issue arrest warrants. Often, my discussions with these defendants are similar to the one I had the other week with Lisa. She told me she just was afraid to come to court and had put off contacting the court due to her fear of arrest and other pressures. I released her immediately, met with her later to set her up on community service and a class on city ordinances, and released any hold on her driver's license.

Numerous judges throughout the country are working with indigent defendants to provide alternative punishments from fines and jail. Their efforts are finally being seen in national media and will, I hope, provide a contrast to the situations where indigent defendants are in jail and have not been provided an indigency hearing and alternative punishment. The strong efforts of the National Task Force on Fines, Fees and Bail Practices, formed by the Conference of Chief Justices and the Conference of State Court Administrators, should help identify ways in which judges can do a better job in making sure indigent defendants are not in jail and are not reoffending after performing alternative punishments to fines and jail.





CourTools Trial Court Performance Measures	
<b>Access and Fairness</b> Measure 1 <i>Admission:</i> Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect. <i>Purpose:</i> More common "waiting" or "being" is what matters most to citizens when dealing with the courts. However, research consistently shows that positive perceptions of court experience are shaped more by court users' perceptions of how they are treated in court, and whether the court's process of making decisions seems fair. This measure provides a tool for assessing of court users about their experience in the courtroom. Comparison of results by location, division, type of customer, and across courts can inform court management practices.	<b>Trial Date Certainty</b> Measure 5 <i>Admission:</i> The number of times cases disposed by trial are scheduled to be tried. <i>Purpose:</i> A court's ability to hold trials on the first date they are scheduled to be tried (trial date certainty) is highly associated with timely case disposition. This measure provides a tool to evaluate the effectiveness of calendaring and courtroom practices. For this measure, "trial" includes jury trials, bench trials (also known as summary or court trials), and adjudicatory hearings to provide cases.
<b>Clearance Rates</b> Measure 2 <i>Admission:</i> The number of outgoing cases as a percentage of the number of incoming cases. <i>Purpose:</i> Clearance rate measures whether the court is keeping up with its incoming caseload. If cases are not disposed in a timely manner, a backlog of cases pending disposition will grow. This measure is a single number that can be compared within the court for any and all case types, or a monthly or yearly basis, or between one court and another. Knowledge of clearance rates by case type can help a court pinpoint emerging problems and indicate where improvements can be made.	<b>Reliability and Integrity of Case Files</b> Measure 6 <i>Admission:</i> The percentage of files that can be retrieved within established time standards and that meet established standards for completeness and accuracy of contents. <i>Purpose:</i> A reliable and accurate case file system is fundamental to the effectiveness of day-to-day court operations and fairness of judicial decisions. The maintenance of case records directly affects the timeliness and integrity of case processing. This measure provides information regarding (a) how long it takes to create a file, (b) whether the file's content and case summary information match up, and (c) the organization and completeness of the file.
<b>Time to Disposition</b> Measure 3 <i>Admission:</i> The percentage of cases disposed or otherwise resolved within established time frames. <i>Purpose:</i> This measure, used in conjunction with Measure 2 Clearance Rates and Measure 4 Age of Active Pending Caseload, is a fundamental management tool that measures the length of time it takes a court to process cases. It compares a court's performance with local, state, or national guidelines for timely case processing.	<b>Ensuring Fairness in Legal Financial Obligations</b> Measure 7a <i>Admission:</i> Ratings by defendants, complainants or their attorneys by the court to cases in which the court has imposed a legal financial obligation (LFO). <i>Purpose:</i> This measure evaluates the extent to which the court is seen by its customers to demonstrate fairness, respect, equal treatment, and concern to the imposition of legal financial obligations (LFOs).
<b>Age of Active Pending Caseload</b> Measure 4 <i>Admission:</i> The age of the active case pending before the court, measured as the number of days from filing until the time of disposition. <i>Purpose:</i> Having a complete and accurate inventory of active pending cases and tracking their progress is important because this pool of cases potentially requires court action. Examining the age of pending cases helps determine, for example, the cases showing over or short to surpass the court's case processing time standards. This information helps focus attention on what is required to ensure cases within reasonable timeframes.	<b>Management of Legal Financial Obligations</b> Measure 7b <i>Admission:</i> The percentage of cases in which legal financial obligations are fully met. <i>Purpose:</i> Integrity and public trust in the administration of justice depend in part on how and how well court orders are observed and enforced. In the context of legal financial obligations, courts work to manage compliance to maintain a defendant's ability to successfully meet these obligations. In particular, maintaining the victim's rights and accountability for enforcement of sanctions imposed on offenders are means of ensuring public interest and concern. The focus of this measure is on the extent to which a court successfully manages the enforcement of court orders requiring payment of legal financial obligations.
	<b>Fair Practices for Legal Financial Obligations</b> Measure 7c <i>Admission:</i> Ratings by judicial officers, court administrators, and court staff on the importance of practices used by the court to determine, monitor, and enforce compliance by defendants with legal financial obligations (LFOs). <i>Purpose:</i> Using a short survey, this measure provides a method of self-assessment for court personnel to evaluate the utility of their current practices and gauge the importance of incorporating additional recognized good practices to enhance defendant compliance with LFOs.
	<b>Effective Use of Jurors</b> Measure 8 <i>Admission:</i> Juror Yield is the number of citizens selected for jury duty who are qualified and report to serve, expressed as a percentage of the total number of prospective jurors available. Juror Yield is the rate at which prospective jurors are used at least once in trial or jury duty. <i>Purpose:</i> The percentage of citizens available to serve relates to the integrity of justice, the effectiveness of jury management practices, the willingness of citizens to serve, the efficiency of juror and post-jury management policies, and the number of exemptions allowed. The objective of this measure is to minimize the number of unused prospective jurors—the number of citizens who are summoned, qualified, report for jury service, and who are not needed.
	<b>Court Employee Satisfaction</b> Measure 9 <i>Admission:</i> Ratings of court employees assessing the quality of the work environment and relations between staff and management. <i>Purpose:</i> Court staff and level employees have a direct impact on a court's performance. This measure is a powerful tool for assessing employee opinion on whether staff have the materials, information, direction, sense of mission, and commitment to the quality work. Knowing how employees perceive the workplace is essential to facilitate organizational development and change, create teamwork and management style, enhance job satisfaction, and thus improve service to the public.
	<b>Cost Per Case</b> Measure 10 <i>Admission:</i> The average cost of processing a single case, by case type. <i>Purpose:</i> Monitoring cost per case, from start to finish, provides a practical means to evaluate existing case processing practices and to improve court operations. Cost per case begins a direct connection between how much is spent and what is accomplished. This measure can be used to assess areas for improvement in new technologies, reengineering of business practices, staff training, or the adoption of "best practices." It also helps determine where court operations may be slack, including inefficient procedures or understaffed staff.

# ReTooling CourTools: Legal Financial Obligations and the New Measure 7

**Richard Schauffler** Director of Research Services, National Center for State Courts  
**Brian Ostrom** Principal Court Research Consultant, National Center for State Courts

With increased scrutiny on court practices regarding the imposition of fees and fines, the National Center for State Courts redesigned *CourTools* Measure 7. This redesign provides a more holistic set of measures for courts to assess their practices related to imposing and enforcing legal financial obligations.

In the wake of the revelations regarding the questionable practices of local law enforcement and the municipal court in Ferguson, Missouri, additional stories continue to surface about the imposition of excessive fees and fines or the incarceration of those unable to pay in one jurisdiction or another. Despite the clear policy direction provided by the Conference of State Court Administrators in its policy papers "Courts Are Not Revenue Centers" (2011) and "The End of Debtors' Prisons" (2016), which are available at <http://cosca.ncsc.org/Policy-Papers.aspx>, some courts have not yet reformed these practices.

*CourTools* Measure 7, Collection of Monetary Penalties, originally published by NCSC in 2005,

was part of the NCSC's balanced-scorecard approach to court performance measurement. As one of the ten *CourTools* trial court performance measures, the initial purpose of Measure 7 was to capture litigant compliance with judicial orders related to the payment of monetary penalties, as well as to illuminate the extent to which restitution was being paid to victims of crimes. Unfortunately, both the title and focus of the original measure seemed to promote the idea that a core function of the courts was to generate revenue.

Moreover, it has become increasingly clear that courts need additional tools for assessing how they are managing legal financial obligations. For these reasons, NCSC took a fresh look at Measure 7.



The revision of Measure 7 is designed to respond to ongoing concerns about how the justice system, as a whole, is operating with respect to fees, fines, and legal financial obligations more broadly. These concerns were summarized in a recent publication of the U.S. Department of Justice (DOJ): *Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees*. In its introduction, the DOJ wrote:

*Justice systems—traditionally funded primarily from a jurisdiction's general tax revenues—have come to rely increasingly on funds generated from the collection of fines and fees, or "legal financial obligations" (LFOs). In some places, justice systems have been transformed into revenue centers that pay for even a jurisdiction's non-justice-related government operations. The U.S. Department of Justice addressed an example in a report of its investigation into the practices of the Ferguson, Missouri police department and municipal courts. Ferguson is not unique; similar problems exist throughout the country.*

Integrity and public trust in the administration of justice depend, in part, on how and how well court orders are perceived by litigants and enforced by the courts. Courts seek to manage compliance with legal financial obligations to maximize a defendant's ability to successfully meet those obligations. In particular, restitution for crime victims and accountability for offenders are issues of intense public interest and concern. This measure focuses on the extent to which a court successfully manages the enforcement of court orders requiring payment of legal financial obligations.

The responsibility of the courts in general, and individual judges in particular, is to ensure that any legal financial obligations arising out of a criminal case are reasonable and take into account a defendant's ability to pay. Compliance with legal and financial obligations has two dimensions.

First, it requires a court, including its judicial officers and staff, to follow applicable statutes, case law, and court policies and procedures that apply to imposing and enforcing legal financial obligations, as well as consciously employing recognized good practices in doing so.

These good practices include determining an offender's ability to pay, based on findings of fact. As noted by the Supreme Court of Alabama in its bench card on *Collections of Fines and Court Costs*:

*In determining whether to impose a fine, the court should consider the reasons a fine is appropriate, the financial resources and obligations of the defendant and the burden payment of a fine will impose, ability of the defendant to pay, and the extent to which payment of a fine will interfere with the defendant's ability to make restitution.*

The second dimension of compliance with legal financial obligations is the requirement that a litigant obey and fulfill the monetary requirements levied by the court. The original Measure 7 was focused only on this second dimension and assumed that the court and its judicial officers were cognizant of and consistently practicing the principles summarized above by the Alabama Supreme Court.

The measure called for evaluating the collection of fines (monetary punishments for offenses) and fees (payments for court costs and other program operational and capital costs as specified in statute), including the timely payment of restitution.



## The New *CourTools*

### Measures 7a, 7b, and 7c

In the wake of Ferguson, the need for additional tools for state courts became clear. These tools, a new set of three related measures in *CourTools*, will allow courts to more effectively assess and improve their practices.

### Measure 7a

#### Ensuring Fairness in Legal Financial Obligations

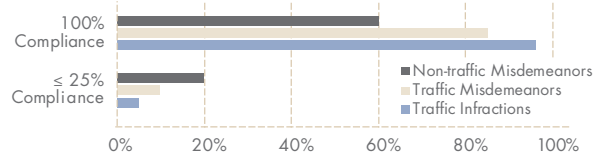
This measure is defined as “ratings by defendants/respondents of their treatment by the court in cases in which the court has imposed a legal financial obligation.” This measure applies the principles of procedural fairness in evaluating the process used to impose a legal financial obligation (treating litigants equally, with fairness and respect). In imposing legal financial obligations, it is important that a court not only do the right thing (matching the sanction to the case) but do it the right way. With Measure 7a, courts have an instrument for measuring their process.

### Measure 7b

#### Management of Legal Financial Obligations

This measure reworks the original Measure 7, now placing the emphasis on the percentage of cases in which legal financial obligations are fully met. The focus is on the extent to which a court successfully manages the enforcement of court orders requiring payment of legal financial obligations, which can be met in a variety of ways as deemed appropriate by the court. These include payment, community service, completion of a relevant, court-approved program (for example, obtaining a GED, counseling, or a driver's license), or credit for jail time served.

#### Compliance with LFOs by Case Type 7b



#### Percent reporting they strongly agree/agree with Fairness questions:

The judge listened to my side of the story before deciding on my fine and fees.



I was treated the same as everyone else.



I got a chance to tell the judge about my ability to pay the fine and fees.



The judge made a fair and impartial decision about fines and fees related to my case, based on the facts.



As I leave the court, I know what to do next with respect to my obligation to pay any fines and fees.



7a

CourTools



## Measure 7c

### Fair Practices in Legal Financial Obligations

This measure is a survey that captures ratings by judicial officers, court administrators, and court staff on the importance of practices used by the court to determine, monitor, and enforce compliance by defendants with legal financial obligations. With this instrument, courts can evaluate the utility of their current processes and gauge the importance of incorporating additional recognized good practices to enhance defendant compliance with legal financial obligations.

### Retaining the Focus

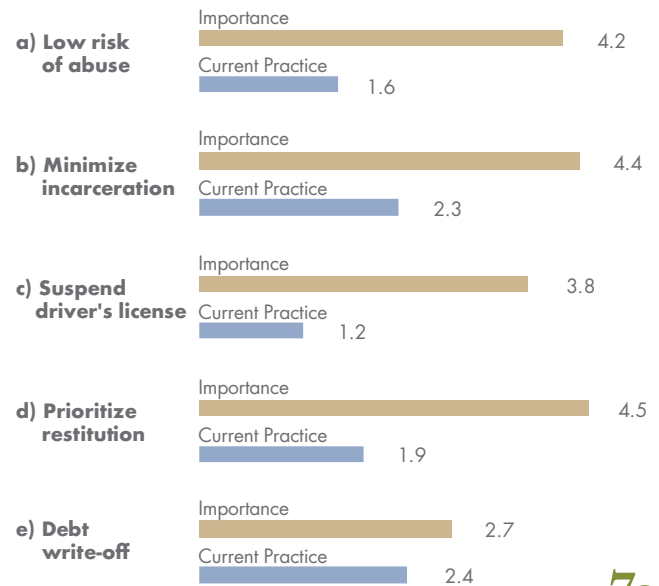
As with the original version, the new Measure 7 is aimed at legal financial obligations in misdemeanor and traffic-infraction cases. The reasons for this are several:

- All courts with criminal jurisdiction process cases involving fees, fines, and restitution.
- Every jurisdiction has at least one criminal court.
- Responsibility for financial accounting in child support and other civil matters is not universally accepted or administered as a core function of courts across the states.
- Ensuring that defendants comply with court orders regarding fines, fees, and restitution is an essential activity of all courts with misdemeanor and traffic jurisdiction.
- Most court orders creating legal financial obligations originate in criminal courts, specifically with respect to traffic infractions, traffic misdemeanors, and non-traffic misdemeanors.
- Due dates are likely to be clearly established and fall within one year from the date they are ordered, making compliance measurable.

## CourTools



### Average Scores in Area 4



7c

### Rapid Progress

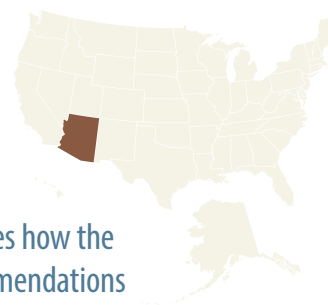
The state courts have moved rapidly to address a number of practices, including assessing the ability to pay and minimizing the practice of suspending driver's licenses in response to nonpayment. The new *CourTools* measures described here are one of many solutions being put in place around the country to improve court performance in this area, which are being documented on the NCSC website at <http://www.ncsc.org/topics/financial/fines-costs-and-fees/fines-and-fees-resource-guide.aspx>. Generating comparable data from the consistent implementation of the new measures will accelerate peer-to-peer learning as courts continue to adopt fair and effective practices in this area.





# Arizona's Task Force on Fair Justice for All

**Hon. Maria Elena Cruz** Judge, Arizona Court of Appeals, Division One



In today's legal system, money often equals freedom. This article addresses how the Arizona Task Force on Fair Justice for All formulated principles and recommendations that focus on the needs of the community and the circumstances of defendants, not exclusively on the ability to pay.

## The Money Problem

Arizona ranks fourth highest among the states for poverty, and more than 21 percent of Arizonans fall below the federal poverty line. They are not all unemployed and homeless, but are instead the “working poor.”

All too often, poverty results in the inability to pay traffic fines. The goal behind financial penalties for violations of the law is to ensure accountability and deter future violations, but not to cripple citizens by making it impossible to ever achieve compliance after an initial violation.

---

*Jailing people on the basis of what amounts to a wealth-based distinction violates well-established norms of fairness as well as constitutional principles.*

Harvard Law School, Criminal Justice Policy Program

---

The average cost of a citation for driving without auto insurance is \$1,040, and it is unlikely that a person supporting a family on a minimum-wage income can pay that amount immediately after a citation is issued. Many litigants of limited means simply do not appear before the court to pay or to make some feasible payment arrangement.



That failure to appear then results in the suspension of their driving privilege. The problem is exacerbated because public transportation is nonexistent in many rural Arizona counties and limited even in the urban counties where there is public transportation. This lack of a license creates substantial transportation challenges for families managing home and work schedules. It is not surprising that many decide to drive despite having a suspended license. By making this choice, however, they are risking a criminal offense, potential impoundment of their vehicle (a costly proposition), and the very real possibility of being arrested and jailed.

### Public Opinion

*69% of voters believe the criminal justice system favors the rich. Only 13% strongly believe it treats everyone equally.*

Lake Research Partners, Key Findings on Public Opinion Research: Pretrial Risk Assessment, August 2015.

The Arizona State Constitution states that there shall be no imprisonment for debt. Nonetheless, every day hundreds of Arizonans who do not pose a risk to the community sit in our jails simply because they are unable to post bail. This occurs despite the criminal justice system's goal to treat all citizens equally. In practice, when it comes to pretrial incarceration, the result has been disparate treatment based on ability to pay.

For example, a person arrested in Maricopa County for a minor misdemeanor offense who has bail set at \$200 may not be able to post that amount and be released. Instead, that person would either sit in jail for several days in excess of any jail term to which he or she may be sentenced, or plead guilty to achieve a more expedient release. Litigants without means regularly suffer longer periods of incarceration.

### The Task Force

Arizona Supreme Court Chief Justice Scott Bales appointed a task force composed of 24 members from all criminal justice agencies. The task force members included judges of the superior justice and municipal courts, commissioners, court administrators, court clerks, corrections leadership, law-enforcement leadership, county administration, prosecution, public defense, probation, Administrative Office of the Courts, and public-interest attorneys. Administrative Order 2016-16 charged the task force with studying current law and court practice and making recommendations to address the disparity of the impact of court fees, fines, and bail determination among the citizens of the State of Arizona. It was of utmost importance that public safety and compliance with court orders be promoted with an eye toward furthering economic opportunity and family stability within our state.



## ***The Task Force Recommendations— 11 Guiding Principles***

The task force analyzed a database of 800,000 Arizona misdemeanor, criminal traffic, and civil traffic cases. It generated 11 guiding principles and 65 recommendations to address concerns regarding fees, fines, and bail practices. Consistent with the mandate of the Arizona Supreme Court, the task force's recommendations were presented to the Arizona Judicial Council for further implementation. The guiding principles are summarized as follows.

### ***Fees and Fines***

#### ***Principle 1***

***Judges need discretion to set reasonable penalties.***

Mandatory minimum fines affect the poor disproportionately. Therefore, when a person is unable to pay a fine, the court should be permitted to mitigate the fine or provide some other pro-social alternative of accountability. The court can determine the defendant's ability to pay by using certain available software programs. In turn, this assessment avoids the danger that the court will enter financial orders that are impossible to meet. The court can also use information regarding ability to pay in determining proper monthly payment responsibilities for each defendant.

#### ***Principle 2***

***Convenient payment options and reasonable time-payment plans should be provided and based on a defendant's ability to pay.***

Fifty-nine percent of people cited in Arizona pay their fines in full. The other 41 percent either enter a time-payment plan or do not pay at all. Reasonable time-payment plans ensure a higher level of compliance with court-ordered fines. A monthly payment plan that is outside a person's ability to pay will inevitably result in a failure to pay.

A pilot program in Yuma County will explore the viability of a system by which persons who cannot pay traffic fines may receive a reduction in the total amount owed, enroll in a reasonable payment plan, and receive reinstatement of their driver's licenses. These are practices consistent with bringing Arizonans into compliance with the law while holding them accountable.

### ***Principle 3***

***There should be alternatives to paying a fine.***

For those who cannot pay a fine at all, incarceration is often the result. However, in *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971), the Supreme Court held "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Currently, Arizona judges have the authority to impose community service in lieu of a fine. However, this ability is limited to the base fine only and not the surcharges, which often exceed the base fine itself. Judges should be permitted to deploy sentencing options better suited to the needs of the defendant.

### ***Appearance in Court***

#### ***Principle 4***

***Courts should employ practices that promote a defendant's voluntary appearance in court.***

In fiscal year 2014, 103,000 people who were cited for traffic violations failed to appear in court. The results of these failures to appear may prove devastating for the individual, including license suspension and additional fines. Subsequent violations can result in arrest, loss of employment, eviction, and other financially crippling consequences. Courts can easily institute practices that remind people of their upcoming hearing and thereby encourage compliance. Some Arizona courts saw as much as a 23 percent reduction in failures to appear simply by using a phone-reminder system, which alerted defendants of their court dates. Encouraging the use of technology for scanning and photographing proof of insurance can also assist in increasing compliance without requiring time away from work to personally appear in court.

### Principle 5

#### *Suspension of a driver's license should be a last resort.*

In many rural areas of Arizona, there is no public transportation. Even in urban areas driving can be necessary for maintaining employment. However, when a person fails to pay a civil penalty, a license suspension must issue. Driving on a suspended license is a criminal offense. Given the serious effects of a license suspension, courts should explore other collection efforts before suspending an individual's ability to drive lawfully.

### Principle 6

#### *Non-jail enforcement alternatives should be available.*

Courts are now employing alternatives to jail, such as restitution courts and collection programs, which monitor and ensure compliance. These alternatives are more cost-effective than incarceration, which comes at an added cost to taxpayers.

### Principle 7

#### *Special-needs offenders should be addressed appropriately.*

Specifically, the task force identified two main groups of special offenders: persons addicted to illicit substances and persons suffering from mental-health issues. The former are frequently housed in our jails with a high rate of recidivism. Unaddressed substance-abuse issues prove detrimental to the health and safety of the afflicted individual and contribute to continued criminal activity and victimization of the community. The latter are unnecessarily incarcerated over several months for evaluation and determination of their competency to stand trial. Streamlined processes and collaboration with the local regional behavioral health authority can help shorten incarceration periods for evaluation purposes and improve continuity of services for the mentally ill upon release.

## Trends in the U.S.

### Jefferson County, Colorado, Court Date Notification Program

In 2005 the Jefferson County Criminal Justice Planning Unit reported that a telephone-reminder pilot program significantly reduced the court's failure-to-appear rate. The now fully funded and permanent program has expanded and has further increased the court appearance rate.

See "Jefferson County, Colorado, Court Date Notification Program Six Month Program Summary," at <https://tinyurl.com/k7peydv>.



### Nebraska's Court Date Reminder Postcards Pilot Program

From 2009-2010, researchers at the University of Nebraska Public Policy Center tested the effectiveness of a postcard reminder program in 14 of Nebraska's county courts. The postcards not only reminded defendants about hearings, but also warned them of the possible sanctions for not appearing, resulting in a large reduction in failure-to-appear rates.

See M. N. Herian and B. H. Bornstein, "Reducing Failure to Appear in Nebraska: A Field Study," *Nebraska Lawyer* (September 2010), at <https://tinyurl.com/mobsuuu>.





## Eliminate Money for Freedom

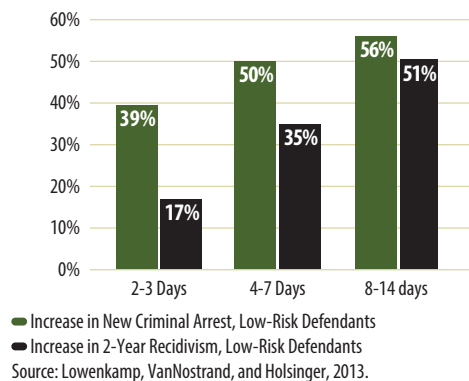
### Principle 8

***Detaining low-to-moderate-risk defendants causes harm and higher rates of new criminal activity.***

Research shows that “detaining low-risk and moderate-risk defendants, even for a few days, strongly correlates with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low-risk and moderate-risk defendants also increase significantly” (Lowenkamp, VanNostrand, and Holsinger, 2013).

Why Do We Care?

**Comparing the Recidivism Rates of Low-Risk Defendants**



### Principle 9

***Only defendants who present a high risk to the community or individuals who repeatedly fail to appear in court should be held in custody.***

Currently, many persons within our state are held in jail pretrial even if they do not pose a safety risk to the community or a risk to fail to appear for future hearings, only because they do not have the money to post even the most minimal bail. Pretrial incarceration should be reserved for those who pose a risk to the community and those who are not likely to appear for future proceedings.

Otherwise, incarceration is not only an unjustifiable taxpayer expense, but also an unjust and counterproductive practice, which tends to increase the likelihood that the person may reoffend in the future. The practice may be particularly unjust in cases where defendants will have served a lengthier time in pretrial incarceration than they would have had they been convicted from the outset of the case.

*“... defendants who are high-risk and/or violent are often released ... nearly half of the highest-risk defendants were released pending trial.”*

Laura and John Arnold Foundation, 2013.

### Principle 10

***Money bond is not required to secure appearance of defendants.***

The money bail system requires that the defendant pay some third party a fee, which he will not recover, regardless of whether he is found guilty or not guilty. However, courts can use unsecured bonds or other release conditions to ensure the defendant will return to court. Some of those alternatives include pretrial supervision and global-positioning-system monitoring.

### Principle 11

***Release decisions must be individualized and based on a defendant’s level of risk.***

Rather than using predetermined bail schedules, courts should make individualized assessments of the individual’s special circumstances, flight risk, and risk to the community.

## The Proposals

### *Court System Innovations*

Courts should use pretrial risk screening for all misdemeanor defendants and release those who do not pose a flight risk or a danger to the community. Substance-abuse and mental-health screenings done before initial appearance will result in viable treatment-plan alternatives to jail. Increased pretrial service capacity will increase the number of persons promptly returning to their work life. Training of judicial officers and court staff will assist in changing the culture of how our institutions view the role of money in our system of justice.

### *Preventing and Resolving Failure-to-Pay Warrants*

Rather than issuing warrants for failure to pay at the outset, courts can encourage compliance by utilizing automated call systems, setting Order to Show Cause hearings, and notifying defendants of nonpayment.

### *Legislative Proposals*

In all, the Task Force on Fair Justice for All made 65 well-thought-out recommendations. Flowing from these recommendations are four pieces of legislation currently moving forward in the Arizona legislature.

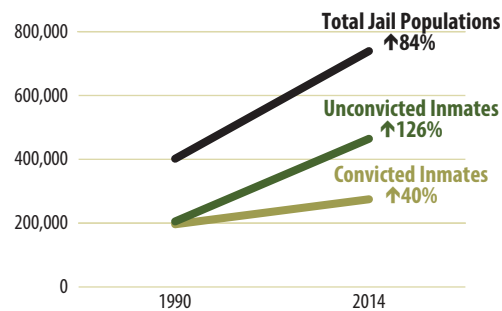
- 1 *A bill that gives presiding judges of the superior court the power to authorize a limited-jurisdiction court to exercise jurisdiction over competency hearings in a misdemeanor case, thereby reducing the time from arrest to resolution of a case where a potentially incompetent person may be involved.*
- 2 *Legislation that gives the court the flexibility to remove all or part of a debt due to the court for 20 or more years after reasonable collection efforts have been exhausted.*
- 3 *Legislation that provides for a restriction, rather than revocation, of a person's driver's license as a result of a conviction for a driving violation to facilitate lawful driving to and from the place of education, the office of a health professional, the probation office, and the place of employment (and during periods of time while in the course of employment), as well as to transport dependents to and from their places of employment.*
- 4 *A bill that permits the court to deny bail to a defendant accused of a felony offense when there is clear and convincing evidence that no combination of conditions of release may be imposed that will reasonably assure the safety of another or the community and that the proof is evident and the presumption is great that the person committed the offense charged. This same bill takes the money out of the determination of release by moving from bail to bond schedules, such that alternatives to money release may be available to misdemeanants where the traffic violation does not involve death or serious physical injury.*

## Conclusion

The task force's study revealed that the impact of fees and fines on an individual's life varies greatly depending on that individual's income level. A person with a lower income level will usually experience a more punitive and overwhelmingly negative effect from the monetary penalty than one who can pay it without disruption to his personal and professional life. For the working poor, a situation that begins as a civil traffic citation has the potential to quickly evolve into a criminal offense leading to arrest and incarceration. This is a result driven by economic status, which puts people in a cycle of noncompliance from which they may not be able to break free. The current initiatives being piloted around the State of Arizona focus heavily on the imposition of fines that citizens can pay, on realistic and affordable payment plans, and on court use of electronic reminders, automated calls, and other programmed systems, which lead to higher levels of compliance.

The Administrative Office of Courts' legislative proposals relating to the removal of money from bail consideration refocuses release considerations. They appropriately evaluate risks to ensure the safety of the community and the defendant's likelihood of appearing at future proceedings. The state is better served by detaining only those who pose a risk rather than expending resources on pretrial incarceration of those not likely to reoffend or fail to appear. At the same time, the state avoids the unintended consequence of increasing the likelihood that low-risk offenders will now be at a higher risk to recidivate. Because money does not ensure greater rates of court appearances or safety to our community, money should no longer equal freedom.

### Unconvicted Inmates: Driving Jail Increase Since 1990



### Jail Population Increases, 1990-2014 (1 full icon = 10% Increase)



*So, unconvicted inmates accounted for 77% of the increase in total jail populations since 1990.*

■ Convicted ■ Unconvicted  
Source: Minton and Zeng, 2015.

## References

- Arizona Supreme Court (2016). "Establishing the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies and Appointment of Members." Administrative Order 2016-16. Online at <https://tinyurl.com/l527wba>.
- Arizona Supreme Court (2016). "Justice for All: Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies," August 12. Online at <https://tinyurl.com/gndyrsb>.
- H. Cisneros and C. Huff (2016). "Violation Review Data Driven Results." Arizona Administrative Office of the Courts, April 7.
- Laura and John Arnold Foundation (2013). "Developing a National Model for Pretrial Risk Assessment." LJAF Research Summary, New York, November.
- C. T. Lowenkamp, M. VanNostrand, and A. Holsinger (2013). "The Hidden Costs of Pretrial Detention." Research report, Laura and John Arnold Foundation, New York, November.
- T. D. Minton and Z. Zeng (2015). "Jail Inmates at Midyear 2014." Bureau of Justice Statistics *Bulletin*, Washington, D.C., June.
- T. Murray (2017). "Pretrial Justice." Presentation at the Arizona Supreme Court Legislative Summit, Phoenix, January 10.





# The Problem with Making Children Pay for Probation Supervision

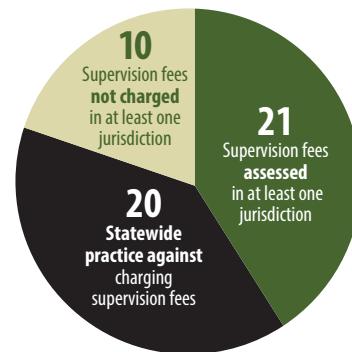
**Mary Ann Scali** Executive Director, National Juvenile Defender Center, Washington, D.C.

**Hillela Simpson** Gault Fellow, National Juvenile Defender Center, Washington, D.C.

The National Juvenile Defender Center found that approximately 40 percent of states charge “supervision fees” to children placed on probation in the juvenile court system. These fees increase racial and economic disparities, trap families in a cycle of debt, and undermine the very purpose of probation.

The National Juvenile Defender Center (NJDC) is releasing a report on the harms of juvenile probation supervision fees—or fees charged to children and families for probation itself. The findings are based on interviews with juvenile defenders and juvenile-probation officers from all 50 states and the District of Columbia and offer insight into the prevalence and detrimental impact of juvenile probation supervision fees nationwide.

*Prevalence of Juvenile Probation Supervision Fees Among the 50 States and the District of Columbia*



# Trends in the U.S.

## Supreme Court of Ohio Juvenile Bench Card

In 2016 the Ohio Supreme Court released a bench card for costs, fees, fines, and restitution in juvenile court. The reference guide seeks to better educate judges and court personnel about appropriate financial sanctions and obligations that can be levied in juvenile court.

See “The Supreme Court of Ohio, Financial Sanctions and Obligations in Juvenile Court,” at <https://tinyurl.com/l83y8ac>.



## Washington State Supreme Court Juvenile Reference Guide

In 2015 the Washington State Supreme Court Minority and Justice Commission released a reference guide on the Legal Financial Obligations (LFOs) for Dispositional Orders in juvenile cases. Most LFOs associated with juvenile offenses were abolished in Washington State by the Youth Equality and Reintegration Act of 2015.

See “Reference Guide: Legal Financial Obligations: Dispositional Orders,” at <https://tinyurl.com/mlrgzvo>.



## Assessment and Cost of Supervision Fees

Even though young people generally have no independent income, they can be charged fees at almost every step of juvenile court proceedings: application fees to get a “free attorney,” fees for detention and incarceration, and fees for court administration, among others. Juvenile probation supervision fees can cost hundreds, sometimes thousands, of dollars on top of the other costs of children’s court involvement.

Probation is the most common disposition youth receive in juvenile court. Ordered in over half of delinquency cases, probation is intended to influence positive behavioral change while allowing children to remain at home instead of locked in a facility. However, this disposition often comes at a significant literal cost to youth and their families: Children placed on probation can be charged a “supervision fee.” This fee is generally separate from any additional costs assessed for probation programs, such as counseling or drug testing, making it one more expense families and youth may be required to cover.

NJDC’s report found that approximately 40 percent of states charge juvenile probation supervision fees to children and their parents. Approximately 15 percent of states charge supervision fees, costs, or both for probation services, such as substance-abuse programs.

The costs of supervision fees vary widely among the states charging fees. The fees can be charged to the child or their parents, or the child and parents can be held jointly responsible for the amount. Supervision fees are typically assessed for each month a child is on probation, the length of which is up to judicial discretion, and can range from a few months to a few years; however, some states simply charge a flat fee regardless of the length of supervision. NJDC found that the total cost for probation supervision can range from \$10 to well over \$2,000, an unreasonably high amount for children and families caught in the juvenile system.

---

*Approximately 15 percent of states charge supervision fees, costs, or both for probation services, such as substance-abuse programs.*

NJDC Report

---

## Collection and Enforcement of Supervision Fees

Most states do not have a process for courts to consider families' financial situations and relieve the burden of some or all of these fees when appropriate. NJDC found just one state that conducts an ability-to-pay hearing, which occurs without a right to counsel. Only a handful more states "often" waive fees when a child is unable to pay. Over a quarter of the states that assess supervision fees have no process by which a child or parent can seek a waiver or reduction of fees. In some states, probation departments can adjust supervision fees without court oversight. Across the board, determinations to lessen supervision fees are entirely ad hoc, depriving children and families of a formal opportunity to be heard.

Charging supervision fees without procedures in place to ensure ability to pay may unconstitutionally punish children for being poor. These fees are assessed without proper inquiry into whether children can afford the fee, contrary to *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). This practice also deprives children of due-process rights, including the right to counsel, affirmed 50 years ago in *In re Gault*, 387 U.S. 1 (1967). At a minimum, courts must learn whether a child can afford to pay the fees or, preferably, eliminate these fees and presume that all children are unable to pay supervision fees.

Supervision fees are generally deposited into a state's general fund or are allocated to the probation department or the juvenile court system. This arrangement creates a troubling incentive for probation departments and courts to enforce these fees to generate income. Ironically, many probation officers stated that they do not see the benefit in charging supervision fees and acknowledged the financial and emotional burdens the fees place on children and families. Probation officers themselves believe their time is better used influencing positive behavior than demanding fees as collection agents.



## Harms and Consequences of Charging Supervision Fees

With no hope for financial relief from supervision fees, youth are often forced to endure severe and long-lasting consequences.

A number of states can extend the length of a child's probation indefinitely if they do not pay the supervision fee, even if the child is satisfying every other court order. Prolonging probation due to unpaid fees not only buries children deeper in debt but also diminishes their hard work and progress—undercutting successful behavior that probation is supposed to encourage. Other states can revoke (or threaten to revoke) a child's probation and send them to a locked facility simply for failure to pay. At least one state can suspend a child's driving privileges and prevent them from sealing their juvenile court record until the amount is paid in full, paradoxically creating barriers for a child trying to earn money to pay back the debt. And a quarter of states can impose a civil judgment on the child or their parents for failure to pay, meaning that the outstanding fee is treated as a civil debt that can lead to garnished wages, withheld taxes, or reduced credit scores. Only a few states do not impose some type of consequence on a child or their family for failure to pay supervision fees.

*"We are trying to get money from poor people by keeping them on probation."*

Juvenile Probation Officer in Florida



Probation is intended to promote positive youth development, but charging a youth supervision fees shifts the emphasis from meeting meaningful goals to financial compliance. The often insurmountable burden of supervision fees may affect the child's view of the legitimacy and fairness of the court system. Furthermore, the consequences triggered by unpaid fees exacerbate disillusionment with the system, pull youth deeper into the system, and negatively impact community safety by increasing recidivism. Probation should only serve to help children successfully move on with their lives, not derail their progress.

The absence of remedies and the severity of consequences positions children and parents in an impossible dilemma: trigger consequences such as civil debt or incarceration by not paying the fees, or divert critical family resources to cover the costs. Such financial pressure strains family engagement, an invaluable part of reducing a child's recidivism. Sometimes, families simply cannot afford to pay at all, and the threat or reality of sanctions looms over them, causing stress, uncertainty, and fear over whether they will ever escape the court system.

## Working Innovations

- **Alameda County, California:** In July 2016, Alameda County became the first county in California to end the practice of charging juvenile-supervision fees. Previously, the county charged families \$90 per month for probation supervision, which typically cost families a total of \$1,530.
- **Marion County, Indiana:** In 2015, the juvenile court in Marion County started to phase out probation-supervision fees. The court had observed the negative impact of these fees on children and their families and decided to cease automatically charging supervision fees in every case.
- **Umatilla County, Oregon:** Umatilla County currently charges a flat fee of \$200 for probation supervision, but offers children the opportunity to complete community service to pay off the fee. The chief probation officer can waive the fee at the end of the child's probation if they have demonstrated positive behavior change.

*"A lot of the families we work with are typically low-income, so the fees and fines put a burden on them as well as our rehabilitative efforts . . . We want youth to focus their time and energy on becoming productive citizens."*

Juvenile Probation Officer in California

## What Can Courts Do?

Courts are uniquely situated to ensure that children are not unconstitutionally assessed probation supervision fees and to model for other court actors the diligence that should go into such a decision. Courts can proactively end the harmful practice of assessing supervision fees by taking the following actions:

- end the practice of charging children and families probation supervision fees statewide;
- presume that children cannot afford any costs, fines, or fees, including supervision fees;
- conduct hearings on ability to pay, at which the child's attorney is present, before assessing any fee or imposing any consequence for failure to pay a fee; and
- decline to extend or revoke probation based on a child's inability to pay any costs, fines, or fees, including supervision fees.

## Conclusion

Probation supervision fees hurt children, families, and communities for a negligible financial profit. Meanwhile, these fees undermine the goals of probation and the child's path toward success by prolonging system involvement, decreasing community safety, and exacerbating racial and economic inequalities. Courts should not charge a la carte for services that are in the interest of public safety and should not continue a practice that has a net negative effect on the communities they serve. Probation and court practice must align with the principles of due process and the purpose of juvenile court, and serve to set children up for success.



# The Work of the National Task Force on Fines, Fees and Bail Practices

**Hon. Maureen O'Connor** Chief Justice, Supreme Court of Ohio

**Laurie K. Dudgeon** Director, Administrative Office of the Courts, Kentucky

*Maureen O'Connor, Scott Griffith, and Laurie Dudgeon (above) presented a plenary session on fines, fees, and bail practices at the 2016 Annual Conference of the National Association for Court Management in Pittsburgh.*

The National Task Force on Fines, Fees and Bail Practices was established in 2016. Their purpose is to develop policies and recommendations that promote the fair, efficient enforcement of the law; ensure no citizen is denied access to justice based on race or lack of economic resources; and promote fairness and transparency in handling legal financial obligations.

Important questions have arisen over the last several years concerning the imposition and collection of court costs, fines, and fees, also known as legal financial obligations (LFOs), and the ways courts, in coordination with their justice system partners, manage the pretrial release of individuals awaiting trial. The Conference of Chief Justices (CCJ) and Conference of State Court Administrators

(COSCA) have long taken the position that court functions should be funded from the general operating fund of state and local governments to ensure that the judiciary can fulfill its obligation of upholding the Constitution and protecting the individual rights of all citizens. In 2012 COSCA released a policy paper that emphasized this point (see Reynolds and Hall, 2012).

CCJ, COSCA, and others (including the National Center for State Courts) have drafted guiding principles, prepared studies, and developed tools and templates to help courts focus on governance, interbranch relations, performance measurement, performance management, and related concepts. Taken together, these resources make clear that independence, fairness, transparency, and accountability are among the most important values to which courts can aspire. Most courts operate in a manner consistent with the concepts and the values outlined in these resources, though all court leaders must continue to be vigilant in ensuring that they are doing so adequately, especially in light of recent research and other developments concerning how courts meet the needs of people who are socioeconomically disadvantaged.

Courts must adhere to due-process and equal-protection requirements that relate to the use of ability-to-pay determinations; the limited conditions under which incarceration can be used for individuals unable to satisfy their court-ordered LFOs; and the need for alternatives to incarceration for individuals unable to pay. Historically, litigants and defendants are charged fees for using courts. The issue is made more complex because supervisory authority over many municipal courts resides with the municipality, rather than the state court system, exacerbating the pressure to produce revenue.

The U.S. Supreme Court has held that converting an individual's fine to a jail term solely because the individual is indigent violates the Equal Protection Clause of the United States Constitution. *Tate v. Short*, 401 U.S. 395, 398 (1971). Courts may only jail an individual when that person has the means to pay but refuses to do so. *Tate*, 401 U.S. at 400. *Bearden v. Georgia*, 461 U.S. 660, 662-63 (1983), held that courts cannot incarcerate for failure to pay without first making an inquiry into facts that demonstrate the defendant had the ability to pay, willfully refused to pay, and had access to adequate alternatives to jail for nonpayment.

The Supreme Court has clearly set forth the guiding principles, and it is the responsibility of court leaders to ensure that these principles have been integrated into practice.

The work of the National Task Force is intended to apply to any nonfederal adjudicative body or entity, however denominated (including, without limitation, any court of general jurisdiction, court of limited jurisdiction, county court, municipal court, traffic court, mayor court, village court, or justice of the peace), that is empowered by law to levy fines, assess fees, or order imprisonment for misdemeanors or infractions (including, without limitation, traffic offenses).

The initial National Task Force meeting was held in March 2016 and included national judicial and legal leaders; legal advocates; policymakers from state, county, and municipal governments; academics; and the public-interest community. Work groups were set up to look at the issues of access to justice and fairness; transparency, governance, and structural reform; and accountability, judicial performance and qualifications, and oversight. A second meeting of the full Task Force was held in November 2016 to review the work to date and to plan for future work. The following “Key Resources,” which are also available at [ncsc.org/finesfees](http://ncsc.org/finesfees), were developed to assist courts as they address the critical issues of fines, fees, and bail practices.

- A Brief Guide to the Work of the National Task Force on Fines, Fees and Bail Practices
- Lawful Collection of Legal Financial Obligations: A Bench Card for Judges
- Model Political Subdivision Court Registration Act
- Model Political Subdivision Court Registration Form
- Sample Language for Model Uniform Citation Notice
- Sample Court Rule on Recording of Limited Jurisdiction Proceedings
- Sample Court Rule: Washington State Rule on Recording of Limited Jurisdictions' Proceedings (ARLJ 13)



The National Task Force plans to continue its efforts on longer-term goals. These efforts will include developing a principles document that will guide courts now and in the future. The principles will include guidance in the areas of structure and policy, governance, pretrial release and bail reform, alternative sanctions, and accountability. Tools and examples will be included with these principles to provide courts with more concrete guidance. The website and interactive map found at [ncsc.org/finesfees](http://ncsc.org/finesfees) serve as a clearinghouse of information and will be updated weekly with information on states that have reports or studies, pilot programs, recent legislation, grants, or lawsuits dealing with fines, fees, or bail practices. Pilot programs addressing the need for alternative sanctions, ability-to-pay tools, and other issues are being considered.

## References

National Center for State Courts (2012). *Principles for Judicial Administration*. Williamsburg, VA: National Center for State Courts. Online at <https://tinyurl.com/kk4a3ou>.

A. Pepin (2016). "The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations." 2015-2016 policy paper, Conference of State Court Administrators Policy and Liaison Committee. Online at <https://tinyurl.com/mwvz7xx>.

C. Reynolds and J. Hall (2012). "Courts Are Not Revenue Centers." 2011-2012 policy paper, Conference of State Court Administrators Policy and Liaison Committee. Online at <https://tinyurl.com/l6j9cs9>.

## Fines and Fees Resource Guide

**NCSC** National Center for State Courts

Trusted Leadership. Proven Solutions. Better Courts.

Search

Newsroom | Publications & Library | About Us | Donate | NCSC International

INFORMATION & RESOURCES | SERVICES & EXPERTS | EDUCATION & CAREERS | CONFERENCES & EVENTS | COMPANION SITES

NCSC > FINANCIAL > FINES, FEES AND BAIL > FINES & FEES

**ACCESS AND FAIRNESS**

- APPELLATE
- CHILDREN, FAMILIES & ELDERLY
- CIVIL
- COURT COMMUNITY
- COURT MANAGEMENT
- COURTHOUSE FACILITIES
- CRIMINAL
- FEDERAL RELATIONS
- FINANCIAL
  - Budget Management
  - Fines, Fees and Bail
  - Foreclosures
- HUMAN RESOURCES
- INTERNATIONAL
- JUDICIAL OFFICERS
- JURY
- LEGAL SERVICES
- MEDIA
- PROBLEM SOLVING COURTS
- SPECIAL JURISDICTION
- TECHNOLOGY
- TOPIC CATEGORY

**National Task Force on Fines, Fees and Bail Practices Resource Center**

The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) formed a National Task Force on Fines, Fees and Bail Practices to address the ongoing impact that these legal financial obligations (LFOs) have on economically disadvantaged communities and to draft model statutes and court rules for setting, collecting, and waiving court-imposed payments.

**What's Included in the Resource Center?**

This Resource Center includes products created by the National Task Force and highlights other resources related to these issues. While the enforcement and collection of various court fines and costs is essential to the integrity of the courts in gaining compliance with court orders and ensuring that those orders are not violated, an increasing amount of attention is being focused on how fines, fees, and bail practices disproportionately impact economically disadvantaged communities.

**Featured Resources**

Criminal Justice Policy Program at Harvard Law School 50-State Criminal Justice Debt Reform Builder

**Task Force Products**

- 1** The National Task Force has created and continues to create tools to help courts improve their practices in this area.
- 2** CCJ and COSCA Policy Papers and Resolutions  
Over the past 15 years CCJ and COSCA have developed policy papers on a variety of important issues. Within the past five years, four papers relate to fines, fees, and bail practices. CCJ and COSCA have also passed resolutions in support of the National Task Force's work.
- 3** State Reports and Resources  
An interactive map providing information on which states have been the subject of studies or reports, which states have pilot programs or initiatives in place, which states have developed ability-to-pay standards and/or other state-specific information related to fines, fees and bail practices.  
Community Courts use alternative sanctions such as treatment, training, or education instead of fines.
- 4** National Reports  
Many government and non-profit organizations have published reports that examine issues surrounding fines, fees, and bail practices.
- 5** Grants Funding National Initiatives  
Organizations such as the Laura and John Arnold Foundation and the State Justice Institute are providing grants for initiatives that will have a national impact.
- 6** International Reports and Resources  
These reports discuss how other countries approach the issues surrounding fines, fees, and bail practices.
- 7** Juvenile Reports  
The issues surrounding fines, fees, and bail practices affect juveniles involved in the justice system, as documented in various reports.

**State Fines, Fees and Bail Practices Interactive Map**

If you have information that can be added or updated please contact [dsmith@ncsc.org](mailto:dsmith@ncsc.org).

**NCSC Resources**

CourTool Measure 7

Pretrial Justice Center for Courts

Listen to NCSC's podcast, *Court Talk*, about bail reform

**Related Resources**

Brennan Center Criminal Justice Debt

Pretrial Justice Institute Pretrial Justice Institute

Vera Institute of Justice Videos *Bail, Fines, and Fees, Examining the Costs and Consequences of Charging for Justice in New Orleans*

The Council of State Governments *Legal Financial Obligations (LFOs)*

Home | Information & Resources | Services & Experts | Education & Careers | Conferences & Events

Contact | Sitemap | Privacy Policy | 300 Newport Ave., Williamsburg VA 23185 | Phone: (800) 616-6164 | Fax: (757) 220-9449

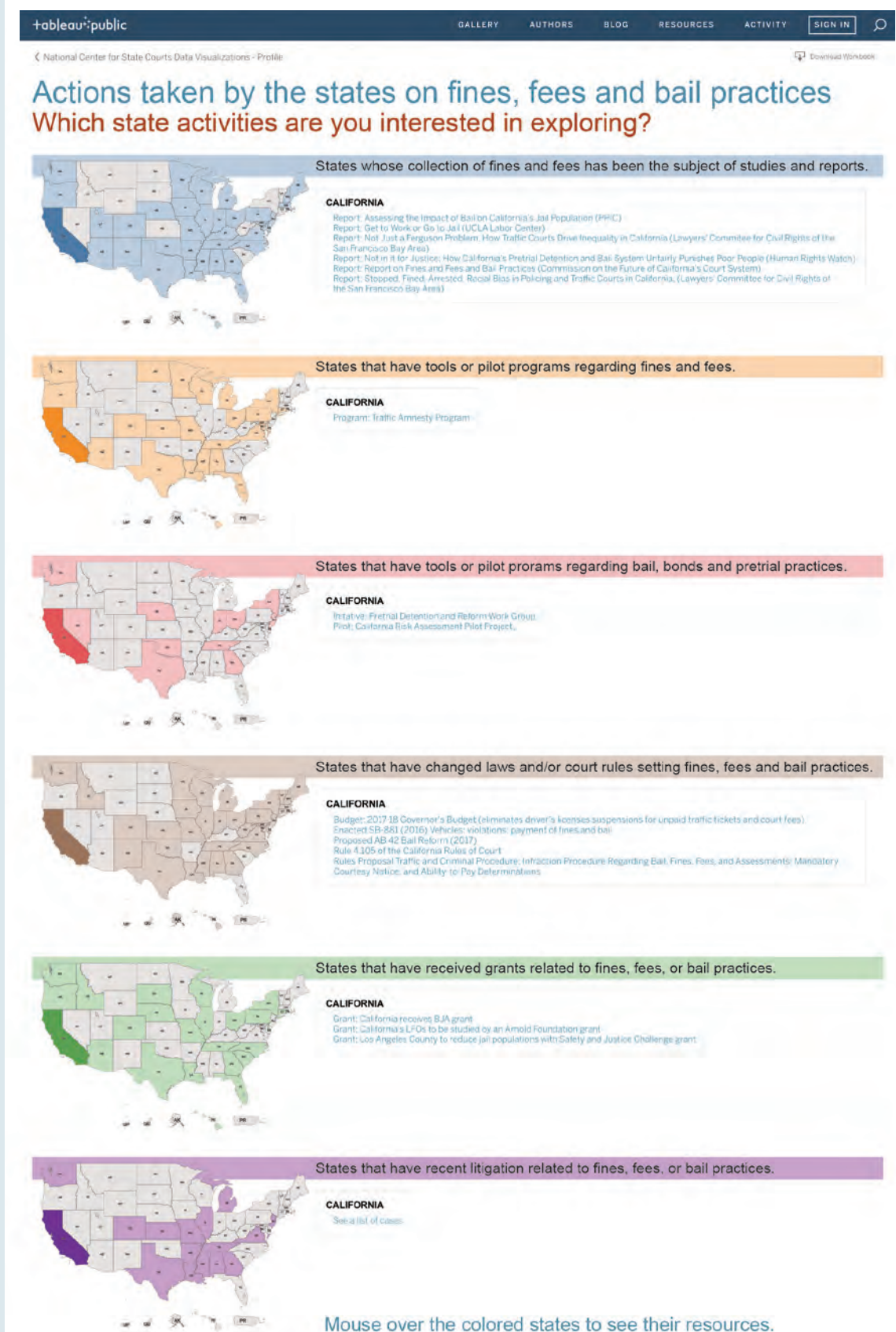
Research services provided by  
the premier company  
**THOMSON REUTERS**

[ncsc.org/finesfees](http://ncsc.org/finesfees)





## State Fines, Fees and Bail Practices Interactive Map



[https://public.tableau.com/profile/publish/FFBP2\\_0/ActivitiesByType#!/publish-confirm](https://public.tableau.com/profile/publish/FFBP2_0/ActivitiesByType#!/publish-confirm)

## NCSC Officers and Management Staff

### National Center for State Courts

Headquarters, 300 Newport Avenue, Williamsburg, VA 23185

**Mary Campbell McQueen** President

**Robert N. Baldwin** Executive Vice President and General Counsel

**Thomas M. Clarke** Vice President Research and Technology Services

**John R. Meeks** Vice President Institute for Court Management

**Jesse Rutledge** Vice President External Affairs

**Gwen W. Williams** Chief Financial Officer and Vice President of Finance and Administration

### Court Consulting Services

707 Seventeenth Street, Suite 2900, Denver, CO 80202-3429

**Daniel J. Hall** Vice President Court Consulting Services

### NCSC International

2425 Wilson Boulevard, Suite 350, Arlington, VA 22201

**Jeffrey A. Apperson** Vice President International Program Division

### Government Relations

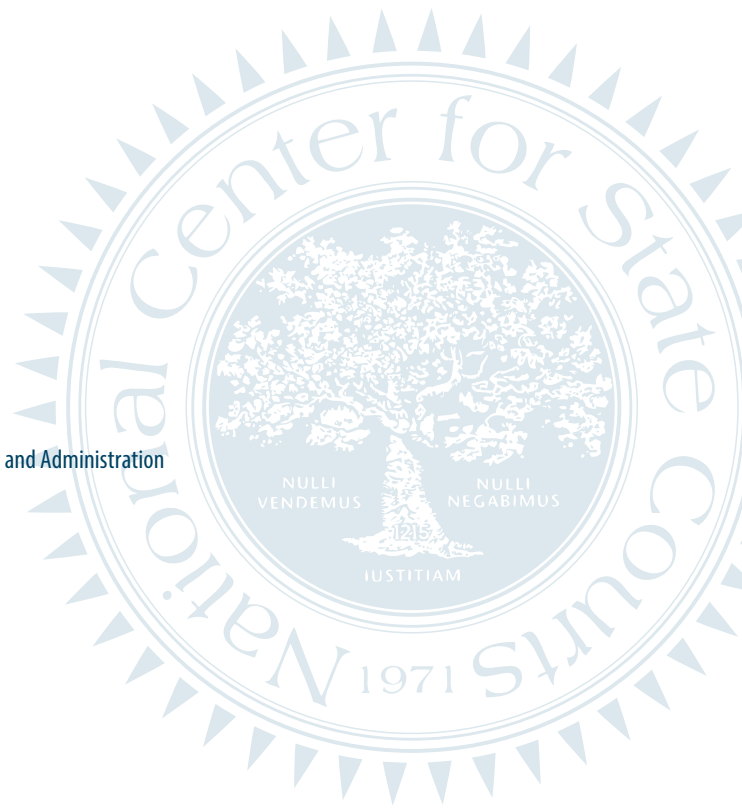
111 Second Street NE, Washington, DC

## A Call for Article Submissions

*Trends in State Courts* is an annual, peer-reviewed publication that highlights innovative practices in critical areas that are of interest to courts, and often serves as a guide for developing new initiatives and programs, and informing and supporting policy decisions. *Trends in State Courts* is the only publication of its kind and enjoys a wide circulation among the state court community. It is distributed in hard copy and electronically.

Submissions for the 2018 edition are now being accepted. Please email abstracts of no more than 500 words by October 13, 2017 to Deborah Smith at [dsmith@ncsc.org](mailto:dsmith@ncsc.org). Abstracts received after this date are welcome and will be considered for later editions or for our monthly online version.

Visit the *Trends in State Courts* website at [www.ncsc.org/trends](http://www.ncsc.org/trends) for more information and detailed submission guidelines.







100	2,250,310	10.032	52.72	-5.80	
50	5,322,000	290.685	475.11	-0.50	
20	4,453,630	51.9	90.53	+19.38	
10	4,422,000	45.32	72.26	-0.48	
5	3,722,480	10.25	46.99	-1.30	
1	1,892,570	111.64	167.95	-1.42	
0.5	1,109,780	28.76	57.84	-4.80	
0.25	28,788,000	47.87	86.4	-0.19	
0.1	74,000	2.3	10.89	+5.23	
0.05	366,000	47.26	68.24	-0.65	
0.025	18,868,200	19,894,200	22.83	47.86	-0.11
0.0125	5,124,700	6,847,000	25.76	50.001	+0.94



[www.ncsc.org](http://www.ncsc.org)