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CRIMINALIZING POVERTY IN NORTH CAROLINA: FINES AND FEES

GENE NICHOL¹ AND HEATHER HUNT²

PRÉCIS

For over two decades, North Carolina has, under a controversial “user fee” notion, developed one of the nation’s most robust regimes of assessed costs and fees triggered by the operation of the criminal justice system. Both the number and the amount of the fees assessed against criminal defendants have risen sharply. Some are not waivable – even upon a showing of indigence. And the General Assembly has recently made it considerably more difficult for state judges to relieve other such payments. For many relatively minor criminal offenses, court ordered assessments can far exceed applicable fines or demanded restitutions. They work massive and widespread hardship upon low income Tar Heels. When poor defendants are unable to pay, a cascade of other punishments can result – including additional fees and fines, probation violations, and, on occasion, incarceration. The resulting scheme – - which works to criminalize poverty in North Carolina – raises very serious equal protection, due process, and separation of powers questions. It also is rooted in the troubling assumption that a strong, impartial, and effective criminal justice system can be funded by exactions from the poorest and most economically disadvantaged members of society.

1. INTRODUCTION

Marcia Morey now represents Durham in the North Carolina General Assembly. But until a year ago, she was Durham County’s much-admired chief district judge. Almost two decades on the bench taught her much. And

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some of it, especially the legal system's treatment of poor people, causes her to lose sleep.

"Think of it," she explained to me in an interview,³ "the great percentage of criminal defendants are poor, but every step of the judicial process involves money."⁴ First there is the cash bond system. "It obviously turns on money, most defendants don't have it, where is the fairness in that?"⁵ Morey asked. Then, perhaps, a defendant misses a court appearance. He gets tagged with a failure to appear, which costs him \$200. Then, finally, a court date is set. If the charge is serious enough and the defendant is indigent, a lawyer is appointed. But there is a fee for that too – \$60 for the initial appointment then an hourly rate for representation. (Most people find that to be a surprise.)

Then, with a guilty plea and no prior convictions, the defendant might receive a thirty-day sentence, suspended. "That sounds good," Morey suggests, "but it includes an order to pay court imposed costs and fees."⁶

The general fee assessed for going to court is around \$150. If community service is ordered, an additional \$250 fee is added. If probation is entailed, the supervised probation fee is \$40 a month. It is not at all unusual for the costs and fees, even in a district court criminal case to exceed a thousand dollars.⁷

If the already-indigent defendant can't come up with the required tab under the demanded time frame, other penalties can ensue – a failure to pay fee (\$50), an installment payment fee, a probation violation, and, eventually, if payment isn't forth coming, actual incarceration. And all of this, Morey reminds, for conduct the court originally believed unworthy, or impermissible, as a basis for jail time. Poverty has its costs. High and punitive ones.

Judge Morey also spoke of a defendant she remembers whom she called Walter Smith (not his real name). She said that one day, as she was hearing the traffic court docket, Smith appeared before her, charged with driving with a revoked license. His license had been suspended, some months earlier, when he failed to pay a speeding ticket. In North Carolina, failure to pay a court-ordered traffic fine triggers automatic suspension of your driver's license. Twenty days after failing to pay the fine and court costs from his earlier ticket, his license was automatically revoked.

3. See, Heather Hunt and Gene Nichol, North Carolina Poverty Research Fund, "Court Fines and Fees: Criminalizing Poverty in North Carolina, Winter, 2017; at http://www.law.unc.edu/documents/poverty/publications/court_fines_and_fees.pdf

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

So, when he appeared in Judge Morey's court, Smith had two problems. He had an unpaid order for the original fine and court fees and he now had a suspended license (and citation) that followed from it. Smith requested a public defender. Morey was unable to appoint counsel, though, because the General Assembly had, a few months earlier, restricted the categories of crimes for which a lawyer could be appointed. So she explained to Mr. Smith that he would need to hire his own counsel. Mr. Smith replied,

Your Honor, I got picked up while driving to the grocery store. I was taken to jail because I didn't pay that old ticket and y'all yanked my license. I have heart disease and can't work. Now do you really think I can afford to hire my own lawyer? I need some help here.

Mr. Smith was standing before her in desperate straits, Morey said. She told him: "I'm very sorry but the law does not permit me to appoint you an attorney and I have to follow it." She says she couldn't help concluding that jail was about to become the punishment for Smith's poverty. She urged the district attorney to find a way to accommodate him. For her part, she waived his court costs and a \$40 a day jail fee. (He'd already spent a day in jail.) Morey said, "He was unemployed, disabled, and simply had no money or ability to pay." As he walked out of the courtroom, he said, "All they want is the damn money."⁸

Smith spent some time in jail, and faced much more, simply because he couldn't pay for his traffic ticket. He didn't do it stubbornly, or on purpose, or under a tirade or protest. He just didn't have any money or any way to get some. Judge Morey concluded:

"Every day, people all over North Carolina face a judge for a minor offense or traffic infraction and are ordered to make payments of hundreds of dollars they simply cannot afford. Far too often nonpayment isn't willful. It is because he or she is unemployed, or disabled, or suffers from mental illness or addiction. Similarly, when a person is arrested on a minor offense like trespassing, marijuana, disorderly conduct – or someone has failed to appear in court, a bond is required. For many a \$500 bond might as well be \$5 million. They are held, not because they are a danger to the community, or because they won't show up, but because they're poor. Jail effectively becomes a debtor's prison."⁹

Judge Morey also recalled that the same week she waived Smith's court costs, a "report card," newly demanded by the General Assembly, was released by the Administrative Office of the Courts, listing all the judges in North Carolina who had waived court costs in criminal cases, and how

8. See also, Marcia Morey, *When Traffic Court Becomes Debtors Prison*, Raleigh News & Observer, April 34, 2016; at <https://www.newsobserver.com/news/local/community/durham-news/dn-opinion/article72612127.html>

9. *Id.*

frequently they had done so in the preceding year. The legislators wanted to know who the soft judges were – those who refused to demand blood from the impoverished turnips. Millions of dollars in court costs under such user fees, the lawmakers assumed, would be deposited in the state’s general operating fund. Literally the poorest people in North Carolina, with the worst economic prospects, were meant to bolster the state’s budget. Judges should take care not get in the way of the project. Also the same week, Morey recalled, the United States Department of Justice had sent a warning memorandum to all state and federal judges – reminding that it is unconstitutional to incarcerate people charged with minor, non-violent offenses, because of their poverty.¹⁰

2. CRIMINAL JUSTICE FINES AND FEES IN NORTH CAROLINA

Fines and fees are among the monetary sanctions, sometimes referred to as legal financial obligations, courts impose on criminal defendants.¹¹ Fines, of course, are levied as the punishment for breaking a law. Fees, on the other hand, are meant to generate revenue and are used to fund the courts and other government activities. In North Carolina fees attach to every step of the criminal justice process. On top of fines and fees, defendants may be ordered to pay restitution to the victim. Over the last two decades, under a general, if odd, ‘user fee’ notion, North Carolina has developed one of the country’s most robust regimes of assessed costs and fees triggered by the use of the criminal justice system. Fees here have increased by over 400% in the last two decades.¹²

Fees are defined by North Carolina statute.¹³ One of the most common is the General Court of Justice fee, which is assessed against all defendants in

10. Dear Colleague Letter, U.S. Department of Justice, (Access To Justice) March 16, 2016; <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf>. See, ABA Journal, Deborah Weiss, “Justice Department Warns Local Courts About Illegal Enforcement of Fees and Court Costs, March 14, 2016; at http://www.abajournal.com/news/article/justice_department_warns_local_courts_about_illegal_enforcement_of_fees_and/. The Justice Department revoked the letter under Attorney General Jeff Session in 2017. See, ABA Journal, Debra Weiss, Sessions Revokes Letter Warning Local Courts About Fines and Fees Imposed on Poor People, Dec. 2017; f

11. Heather Hunt and Gene Nichol, *Criminalizing Poverty in North Carolina*, supra, note 2.

12. Gordon, “His Sentence Carried No Jail Time. So Why Did He Keep Ending Up There?” Charlotte Observer, 2018.

13. North Carolina Administrative Office of the Courts, “Court Costs and Fees Chart.” N.C. Gen. Stat. § 7A-304(a)(4a) and (4b). Examples of improper equipment include driving with a burned-out headlamp or illegal window tinting. N.C. Gen. Stat. § 7A-304(a)(7)-(8a) (lamps) and N.C. Gen. Stat. § 7A-304(a)(11)-(13) (expert witness). See N.C. Gen. Stat. § 7A-321 (collection fees); N.C. Gen. Stat. § 7A-304(f) (installment payment fee); N.C. Gen. Stat. § 7A-304(a)(6) (late payments). N.C. Gen. Stat. §

criminal court (including traffic infractions) who plead guilty or are convicted. The fee is \$147.50 for cases in district court and \$154.50 in superior court. Other fees accompany the General Court of Justice fee and all together a defendant can expect to pay a minimum fee amount of \$178 in district court for an infraction and \$180 for a misdemeanor. Defendants appearing in superior court face fees starting at \$205.

Defendants are charged \$600 for each lab test and expert witness used in their prosecution. There are collection fees, fees for paying on an installment plan or paying late. There are failure to appear fees for missing court dates and failure to comply fees for not paying on time; fees for participating in court-sponsored community service, monthly fees for supervised probation, and one-time and daily fees for electronic monitoring systems. As indicated, defendants who request a public attorney have to pay an appointment fee and an hourly attorney fee, even if they are declared indigent by the court. There are jail fees and other incarceration costs. Strangely, North Carolina has a law enforcement officer retirement fee and sheriff's supplemental pension benefits fee. It is not uncommon for assessed costs, in total, to exceed a thousand dollars in an individual case and to surpass any assessed fine for the transgression. North Carolina does a notably more aggressive job than most states of trying to make criminal defendants foot the bill for the operation of the justice system. (Appendix I contains a schedule of North Carolina criminal court costs.)

The payment of fines and fees is enforced through penalties that include additional monetary sanctions, driver's license revocation and, incredibly, jail time. Although debtor's prison in the United States was banned in 1833, poor people are still regularly incarcerated because they can't pay their court debts. Courts are required by law to inquire into defendants' ability to pay before jailing them, but this rule is often unknown, skirted, or ignored across the state. Judges have the authority to waive many court costs. However, judges waive costs only about 5% of the time statewide. This occasional reprieve is still too much for state lawmakers, who have taken a disturbing series of steps, in recent years, to rein in the use of waivers. As a result, judicial waiver—already rarely used—is an endangered practice in North Carolina.

7A-304(a)(6) (fees for failure to appear and failure to comply); N.C. Gen. Stat. § 143B-708 (community service fee); N.C. Gen. Stat. § 15A-1343(c1) (supervised probation fee); N.C. Gen. Stat. § 15A-1343(c2) (electronic monitoring fees). N.C. Gen. Stat. § 7A-455.1

3. THE IMPACT OF FINES AND FEES ON LOW INCOME DEFENDANTS

Astonishingly high percentages of criminal defendants are poor.¹⁴ National studies indicate that over four out of five of those charged with criminal offenses are poor enough to qualify for a court-appointed lawyer. About a third of defendants are jobless at the time of their arrest. In North Carolina, nearly a third of prison inmates haven't graduated from high school and nearly all have no more than a high school diploma.¹⁵ The state's Department of Correction reports that nearly four of ten inmates have previously been homeless and that seven percent were homeless at the time of their imprisonment. Criminal defendants, in other words, are already notably marked by poverty.

So assessed fees and court costs burden lives which are, at the outset, intensely challenged by economic hardship and marginalization. Impoverished families and households must make excruciating choices between paying for the basic necessities of life. Many juggle the costs of housing, health care, transportation, and day care. Most poor families can't readily meet the economic demands linked to food, utilities, rent, transportation, and family support. One of the former public defenders we interviewed reported:

For lots of my former clients, the fines and fees associated with criminal trials are even worse than the conviction. "I can usually keep my job with a conviction," they say, "but I will lose my housing with all the fees."¹⁶

Unsurprisingly, the financial impacts of court imposed financial obligations often accumulate over time. Unpaid fees lead to late fees, collection, probation supervision and violation fees, and the like. They thus compound, like payday loan abuses often do. They can create a debt loop that becomes impossible for impoverished defendants to escape. Criminal sentences remain active, undischarged, until all court costs are paid in full by the defendant. As a result, dangers of new or renewed penalties linger – threatening economic prospects and opportunities. The treadmill exposes a destructive contradiction at the core of the fines and fees system. Poor

14. See, generally, Heather Hunt and Gene Nichol, North Carolina Poverty Research Fund, "Court Fines and Fees: Criminalizing Poverty in North Carolina, Winter, 2017; at http://www.law.unc.edu/documents/poverty/publications/court_fines_and_fees.pdf; and James, *Profile of Jail Inmates*, In 2015, the median pre-incarceration income for people detained in local jails who could not make bail was \$15,109—or less than half of the median income for non-incarcerated people of a similar age. Rabuy and Kopf, "Detaining the Poor."

15. North Carolina Department of Public Safety, DPS Research and Planning, Automated System Query, <http://webapps6.doc.state.nc.us/apps/asqExt/ASQ>.

16. Heather Hunt and Gene Nichol, *Criminalizing Poverty in North Carolina*, supra, 6.

defendants are punished for being unable to crawl out of an economic hole that the additional assessments simply make deeper. Defendants are forced, over and over, to try to meet financial obligations “in a way that dooms them to a perpetual state of poverty and instability.”¹⁷ A literal, state-imposed, often inescapable debt trap.

Nor is money the only constraint. In North Carolina the timely payment of assessed costs and fees is a condition of successfully maintained probation. As a result, if a defendant defaults on court enforced debt, he violates the terms of his probation. That is so, even if he is fully compliant otherwise. It is not uncommon, therefore, when fees go unpaid, for judges to extend the probationary period in order to ensure leverage to secure payment. Therefore, the dilatory defendant remains under criminal justice system supervision. And with that extension, other constraints continue. The defendant may be required to continue reports to a probation officer (incurring additional fees), make additional court appearances, and meet other demanded restrictions. As scholars have put it, extended probation changes “punishment from a temporally limited experience to a long-term status.”¹⁸

Remaining on probation also frequently threatens civic privileges, including the right to vote. Some defendants are denied access to the ballot until the terms of their probation have been fully discharged. Those on probation for felony convictions cannot vote or run for office in North Carolina. Nor can they serve on juries. As is true with the criminal justice system across the board, conviction, incarceration, and continuing probation serve very disproportionately to burden African-Americans and their communities – where one in thirteen adults have lost the right to vote because of criminal records. Probation violations also frequently disqualify defendants from public benefits programs – including, ironically, poverty alleviation programs. Because defendants can’t pay their court imposed costs and fees obligations, they are barred from receiving Temporary Assistance to Needy Families, Supplemental Nutrition Assistance Program, and Supplemental Security Income – the cornerstones of federal emergency economic assistance.¹⁹

Failure to pay assessed fines and fees also frequently leads to the revocation of the defendant’s license to drive. It affects, today, over a million

17. Beckett and Harris, “On Cash and Conviction: Monetary Sanctions as Misguided Policy,” 529.

18. Harris, Evans, and Beckett, “Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States.” 1755.

19. Heather Hunt and Gene Nichol, *Criminalizing Poverty in North Carolina*, supra at note 2. See also, 42 U.S.C. § 608(a)(9)(A) (TANF), 7 U.S.C. § 2015(k)(1) (food stamps), 42 U.S.C. § 1437d(1)(9) (public housing) and 42 U.S.C. § 1437f(d)(1)(B)(v) (section 8 vouchers), 42 U.S.C. § 1382(e)(4)(A)(ii) (Supplemental Security Income). See Social Security Administration, “Are Probation and Parole Violators Eligible for SSI?” https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2120.html.

North Carolina drivers. And, obviously, the consequences of losing one's ability to drive are substantial. A valid license is frequently required for employment. In major cities, public transit can, sometimes, substitute for a lost license. But even then, studies indicate that a typical car-less resident can reach only about a third of jobs within 90 minutes.²⁰ In areas without mass transit, like much of North Carolina, a lost license can mean that one is effectively stranded. Beyond employment, driving provides access to essential everyday activities – shopping, after school activities, doctor appointments, church services, and the like. Both economic opportunity and family support are diminished. The hole gets deeper.

Finally, as indicated, the failure to pay fines and fees can result in actual incarceration in North Carolina. In *Bearden v. Georgia*,²¹ the U.S. Supreme Court held a defendant cannot be incarcerated for nonpayment unless the judge, after conducting a meaningful hearing, finds that he “willfully refused to pay or failed to make bona fide efforts” to meet the obligation. But many North Carolina judges are either unaware of the requirement or choose to ignore it.²² Incarceration for non-payment of fees can occur in an array of manners in North Carolina. As indicated, failure to pay can constitute a probation violation, which can be punished by jail time. A judge may activate a defendant's suspended sentence to secure compliance with fee obligations.²³ A failure to pay can apparently be characterized as willful and deemed contempt of court. And defendants can be arrested if they fail to appear in court or fall behind on payments.²⁴ North Carolina keeps no record of the number of people, statewide, who are incarcerated for failure to pay fines and fees. A recent estimate found that approximately 18% of inmates in the Mecklenburg County Jail were there because of nonpayment.²⁵

4. FINES, FEES AND THE CONSTITUTION

North Carolina's spiraling scheme of criminal case user fees, restricted and disfavored waivers, and harsh tools of enforcement raises a troubling cascade

20. Tomer et al., *Missed Opportunity: Transit and Jobs in Metropolitan America*, 1. It typically takes much longer to get to work using public transportation. See Maciag, “Riding Transit Takes Almost Twice as Long as Driving.”

21. *Bearden v. Georgia*, 461 U.S. 660, 672.

22. See, generally, Heather Hunt and Gene Nichol, North Carolina Poverty Research Fund, “Court Fines and Fees: Criminalizing Poverty in North Carolina,” Winter, 2017; at http://www.law.unc.edu/documents/poverty/publications/court_fines_and_fees.pdf

23. *Id.*

24. *Id.*

25. Michael Gordon, *His Sentence Carried no Jail Time. So why Did He Keep Ending Up There*, The Charlotte Observer: Opinion (Nov. 11, 2017), <https://www.charlotteobserver.com/news/politics-government/article183866506.html>.

of constitutional issues. They open a chasm, to be sure, between the broad-ranging American aspiration, frequently etched on courthouse walls, of equal justice under law and the present state of criminal justice administration in North Carolina – marking an extreme version of “poor man’s justice.” But the fee and fine structure also burdens the exercise of core constitutional rights and often denies due process of law, the foundational requirements of equality, and the necessary independence of the judicial branch of government.

First, even apart from the fees and fines regime’s worrisome impact on poor people, much of it may violate North Carolina’s constitutional command for a strict separation of powers.²⁶ In March 2016, the U.S. Department of Justice sent a “Dear Colleague” letter to state and federal judicial officers across the nation warning of the impropriety of using court costs to raise revenue for governments more broadly, thus casting doubt on the impartiality, independence and separate functioning of the courts.²⁷

North Carolina’s regime is large, growing, increasingly expensive to defendants, and, often, not closely linked to expenses directly incurred in particular prosecutions. It frequently serves no actual judicial function and is, instead, seen as a revenue source for the General Fund. As the Louisiana Supreme Court has explained, courts, “should not be made tax collectors for [the] state, nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature.”²⁸

North Carolina fees sweep broadly, including paying for sheriff’s pension plans, law enforcement officer insurance and retirement plans, and the like. State courts have typically ruled that criminal case fee assessments must be closely related to “judicial services rendered.” In *State v. Johnson*, the North Carolina Court of Appeals held that criminal prosecution court fees should be “clearly incidental to the function” of the court and “reasonably related to the costs of administering the criminal justice system.”²⁹ The Conference of State Court Administrators has warned against an increasing legislative turn to user fees to fund criminal justice systems while providing general budgetary support to state coffers stating, “The benefit derived from the efficient administration of justice is not limited to those who utilize the

26. John V. Orth, “*The Law of the Land*”: *The North Carolina Constitution and State Constitutional Law: North Carolina Constitutional History*, 70 N.C.L. REV. 1759, 1792-93 (1992). Additionally, the North Carolina Supreme Court noted in a 1982 decision that “[t]here are many indications that North Carolina, for more than 200 years, has strictly adhered to the principle of separation of powers.” *State ex rel. Wallace v. Bone*, 595-97, 286 S.E.2d 79, 81-83 (1982). See also, N.C. CONST. art. I, § 6.

27. Dear Colleagues Letter, United States Department of Justice, March, 14, 2016; (Access to Justice); <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf>

28. *Safety Net for Abused Persons v. Segura*, 692 So.2d 1038, 1042 (La. 1997).

29. *State v. Johnson*, 124 N.C. App. 462, 474 (1996) (quoting *State v. Ballard*, 868 P.2d 738, 742 (Okla. Crim. App. 1994)).

system for litigation, but is enjoyed by all those who would suffer if there was no such system—the entire body politic.”³⁰

In the fiscal year 2016-17, the judicial branch in North Carolina disbursed about \$263 million to the state treasury in court fees alone. It also distributed over \$70 million to local governments and over \$387 million to other recipients for a total of almost \$726 million. The judicial branch operating budget was just over \$518 million. A revenue raising role can cast doubt on the fairness of state tribunals and erode trust between judicial tribunals and their constituents. Senator Shirley Randleman, one of the legislature’s principal proponents of fees, has been candid to say it is “all about the revenue.”³¹

Second, even when costs and fees are constitutionally instituted, as indicated above, it is clear that they cannot be employed to put someone in jail because of inability to pay. To do so the United States Supreme Court held in *Bearden v. Georgia*,³² deprives a defendant of “his conditional freedom simply because, through no fault of his own, he cannot pay the fine.” The due process and equal protection requirements of the Fourteenth Amendment prohibit “punishing a person for his poverty.”³³

As a result, state and local courts must inquire, through a hearing, into a person’s ability to pay prior to imposing incarceration for nonpayment. Courts have an affirmative constitutional duty to conduct these determinations *sua sponte*. To understate, this does not regularly and uniformly occur in North Carolina. The *Charlotte Observer* reports that hundreds of people are held at the Mecklenburg County Jail for failure to pay fines or fees in connection with their criminal convictions. To make *Bearden* meaningful, courts should also examine a defendant’s ability to pay at sentencing, when contemplating the assessment of fees and fines, rather than waiting until failure to pay an imposed obligation. Fundamental notions of due process of law, at a minimum, demand notice to the defendant of the centrality of ability to pay to the punishment determination and an opportunity to explain financial exigency and hardship.

Third, even without directly triggering incarceration, substantial fees and court-imposed financial obligations can impermissibly burden the constitutional rights and interests of low income defendants. North Carolina law, for example, indicates a \$250 community service fee “shall be paid by all persons who participate in the program or receive services from the

30. Carl Reynolds and Jeff Hall, *Courts Are Not Revenue Centers* 9 (2012), <http://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf>.

31. Heather Hunt and Gene Nichol, *Criminalizing Poverty in North Carolina*, supra, 14.

32. *Bearden v. Georgia*, 461 U.S. 660, 672.

33. See also *Tate v. Short*, 401 U.S. 395 (1971).

program staff.”³⁴ This important alternative to harsher sanction can thus be foreclosed to those unable to pay the daunting charge, effectively denying equal protection under law and penalizing defendants for their poverty. The installment fee, pre-trial release fee, probation fee, home monitoring fee, expunction fee, failure to pay fee, and others, in operation, similarly discriminate potently against poor North Carolinians without constitutional justification—closing doors, opportunities, programs, and potential benefits based on income status.

An even larger array of costs and fees directly burden the exercise of explicit constitutional rights. The Fifth and Sixth Amendments of the United States Constitution assure rights of due process, jury trial, witness confrontation, and assistance of counsel. Fees for bail, court facilities, state crime lab work, state lab analysts, and the general use of the court system can burden the exercise of such constitutionally secured rights in ways that fall very disproportionately upon poor Tar Heels. Perhaps most invidious, North Carolina General Statute § 7A-455.1 imposes a mandatory appointment fee on (already determined) indigent defendants who request counsel. National reports suggest that poor people sometimes skip using an attorney to avoid legally assessed financial obligations. North Carolina court observations and interviews with criminal defendants, judges and public defenders indicate that poor defendants not infrequently refuse appointed (constitutionally-mandated) counsel out of fear of judicially-imposed fees and the sanctions that accompany them. This makes a mockery of *Gideon v. Wainwright*.³⁵

Fourth, North Carolina, as indicated, has an unusually long list of user fees in criminal cases. It joins that burgeoning lineup with what is likely the nation’s most aggressive scheme to restrict the judicial waivers that are necessary to assure that poor people aren’t punished criminally for their poverty. In 2011, the North Carolina General Assembly moved to limit traditional judicial discretion to waive economically burdensome fees by requiring “a written finding of just cause” before any waiver can be issued. The next year, 2012, the requirement was expanded to demand “findings of fact and conclusions of law” to support the determination. Then, in 2014, legislators took the path-breaking step of requiring the state’s Administrative Office of the Courts to issue an annual report, outlining by court and individual judge, how many times fees and fines have been waived—a report many judges describe as a legislative “shaming” effort. Then, in 2017, yet another restriction was passed demanding that courts provide a 15-day notice and opportunity to be heard to an array of government entities—615 in all—

34. N.C. Gen. Stat. § 143B-708(c) (2018).

35. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel).

that stand to receive a portion of the fines and fees under consideration to be waived.

In response, Mecklenburg Chief District Court Judge Regan Miller remarked, “It’s clear that the provision is designed to make the process so cumbersome that judges will elect to not waive costs.” Judge Pat DeVine of Orange County was more frank. “The whole scheme is meant to intimidate judges,” she said.³⁶ The law’s primary public spokesperson, Senator Randleman, indicated, tellingly, it was designed to make sure judges “seriously consider their action.”³⁷ The North Carolina scheme mirrors components of the Federal Sentencing Guidelines passage and implementation that were held unconstitutional by federal courts. The Feeny Amendment (to the federal sentencing guidelines) made courts declare reasons for departures from the guidelines and demanded the Sentencing Commission compile a list of all downward departures imposed, with the names of the judges who imposed them. The reporting requirement was deemed a clear “violation of the separation of powers” – seeking to intimidate judges, not to hold them accountable.³⁸

5. PAYING FOR THE CRIMINAL JUSTICE SYSTEM BY SQUEEZING THE POOREST OF THE POOR

Even apart from its formal constitutionality, there is something Kafkaesque about trying to pay for a broadly shared, essential, and society-benefitting criminal justice system on the backs of the very people least able to do it – those with perhaps the most hopeless economic prospects – indigent criminal defendants. We take relatively minor criminal infractions. Minor enough that the defendant typically cannot obtain an appointed lawyer. We then effectively take advantage of both their ignorance and their desperate plight. We assess fees against them that we know they are unable to pay. Then we penalize them for not paying. We then add more fees, extend their probations, revoke their driver’s license, and, on occasion, put them in jail for non-compliance. All of it is as predictable as the sun rising in the east. The whole process (including incarceration) likely costs more than could ever be reasonably obtained through the costs and fees imposition in the first

36. Interview by Pat DeVine with the N.C. Poverty Res. Fund (Aug. 7, 2017).

37. Travis Fain, *Budget Language Targets Court Fee Waivers for Poor Defendants*, The Capitol Broadcasting Company: WRAL: Opinion (Jun. 25, 2017), <https://www.wral.com/budget-language-targets-court-fee-waivers-for-poor-defendants/16781429>.

38. See *United States v. Mendoza*, 2004 WL 1191118 (C.D. Cal. 2004) (holding various portions of the Federal Sentencing Act constitutional, with the exception of the Department of Justice reporting on individual judges sentencing practices, which the court held violated separation of powers.)

place. It is a defiance of logic at every turn. Every level of the absurd structure is based on a ridiculous proposition. It is as preposterous as it is cruel. Kafka meets Dickens.

The oddness arises, foundationally, from the decision to try to fund the criminal justice system by the assessment of user fees on those haled before the tribunals – as if the justice system was the equivalent of a toll road or a paving assessment or a hunting license. It literally punishes and handicaps people for their poverty, in stark violation of any meaningful notion of fairness or equality. It punishes people because they are in the worst possible position to object. As one public defender I interviewed put it, our clients “enter the criminal justice circle of hell ... every day somebody I deal with gets harsher treatment because he doesn’t have any money.” As she says, “it is icky to be part of such a system; it keeps the poor in a certain place, a certain spot.” It is a spot where they are going to get hit again and again. They stay in the loop, adding more and more legal financial obligations without being able to deal with them or satisfy their exigency. The transgression gets worse every year because new fees are added and existing fees are often increased. The judges know they are being watched and are threatened with consequences if they do what their job actually demands, so the tiny percentage of hardship waivers being afforded are markedly reduced. All the while, of course, poverty and child poverty rates in North Carolina are among the worst in the United States and the advanced world. As judges and public defenders and district attorneys all over North Carolina have explained to us, over and over again, the courts of criminal justice shouldn’t be paid for by user fees. All citizens have a potent interest in a strong, fair, egalitarian, functioning, and effective justice system. Citizens ought to pay for it like we pay for the police and fire departments, the governor, and the legislature.

One of the best law students I’ve ever taught spent much of last year doing court observations for me in Orange County. The report she submitted included the following paragraphs:

Almost every person I interviewed was unaware that fines and fees could be waived or reduced at the judge’s discretion. Furthermore, public defenders rarely asked the judge to waive fines and fees. When asked, some judges were more willing to waive or reduce fines and fees than others—a haphazard trend I quickly caught onto. The lack of uniformity regarding procedures to waive or reduce fines was devastating for many defendants, as the outcome of their case usually depended solely on who the judge was. This was particularly true for indigent defendants. Every defendant I interviewed was represented by a public defender and they all had been assessed fees and fines. In very few cases were those fines and fees reduced or waived—most of the time, ability to pay was not even addressed in court.

The people I spoke with all had diverse charges and stories, but they had one thing in common—poverty. During my interviews, I would get the most emotional responses to my questions about fines and fees and ability to pay. Defendants’ concerns with paying these fines and fees and avoiding the consequences of non-payment frequently outweighed their concerns about the outcome of their charges. Crissy [one of the defendants she interviewed] was a great example of this—she declined a trial she likely would have won, according to her own public defender, and pled guilty to a crime in order to avoid the costs and fees associated with going to trial and having to find child care during trial. Like Crissy, many indigent defendants are forced to choose between finances and a more favorable outcome in their case. Similarly, I was told numerous times that people charged with crimes were willing to commit more crimes out of financial desperation just to pay other fines and fees. This is a vicious cycle that must be broken.

The assessment of criminal fines and fees against indigent defendants, without proper inquires as to ability to pay, is devastating to a large portion of our community. Indigent defendants are constantly burdened with exorbitant fines and fees trapped in a cycle they cannot break free of—this observation was shared by most people I interviewed... It is completely irrational and unreasonable to expect the poor, marginalized people in our community to carry such a heavy financial burden.³⁹

As Justice Hugo Black put it 75 years ago, “there can be no equal justice where the kind of trial a person gets depends on the amount of money he has.”⁴⁰

39. Interview with Rachel Van Camp.

40. *Griffin v. Illinois*, 351 U.S. 12 (1956) (Black, J).